

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 837

THE UNITED STATES, PETITIONER,

vs.

JEFF W. MOORMAN AND JAMES C. MOORMAN,
CO-PARTNERS, DOING BUSINESS AS J. W. MOOR-
MAN & SON

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 — In the Court of Claims of the United States

No. 46439

JEFF W. MOORMAN AND JAMES C. MOORMAN, CO-PARTNERS, DOING
BUSINESS AS J. W. MOORMAN & SON, PLAINTIFFS

versus

UNITED STATES OF AMERICA, DEFENDANT

PETITION—Filed May 23, 1945

Come now the above named plaintiffs, Jeff W. Moorman and James C. Moorman, co-partners doing business as J. W. Moorman & Son, and respectfully show to the Court that this is an action to recover payment for work done by the plaintiffs for and on behalf of the United States; said plaintiffs having a contract with the United States, and the controversy arises as to whether the work which plaintiffs were required to do by the United States was within the terms of said contract.

2 The plaintiffs are citizens and residents of Muskogee, Oklahoma, and are engaged in the general contracting business, and they have at all times borne true allegiance to the Government of the United States, and have not, in any way, voluntarily aided, abetted, or given encouragement to rebellion against this Government.

That the claim and cause of action involved herein accrued within six (6) years before the filing of this petition.

Plaintiffs state that heretofore and on the 4th day of April, 1942, there was prepared by the United States Engineer Office a contract letter which was accepted by the plaintiffs herein on April 7, 1942, whereby the plaintiffs contracted for the grading at the site of the Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma. A copy of said contract letter is hereto attached, marked Exhibit "A" and made a part hereof

Subsequent thereto, although made to date as of April 3, 1942, formal Contract No. W-957-eng-851 was entered into between the parties for "Grading Plant Site," "Place, Oklahoma City Aircraft Assembly Plant, approximately 7 miles Southeast of Oklahoma City, Oklahoma," under which contract Article I reads as follows:

"ARTICLE I. Statement of work—The contractor shall furnish the materials, and perform the work for grading the site of the Oklahoma City Aircraft Assembly Plant, consisting of approximately 1,000,000 cubic yards of earthwork, approximately seven miles southeast of Oklahoma City, Oklahoma in accordance with the specifications attached hereto and made a part hereof, for the consideration of twenty-four cents (\$0.24) per cubic yard of grading (earth-

work), satisfactorily completed and accepted by the Government in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications for grading of Plant Site, Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma, as modified by Addendum No. 1, dated March 31, 1942, and the drawings referred to in paragraph 1-15 of the specifications.

"The work shall be commenced as provided for in paragraph 1-05 of the specifications attached hereto and made a part hereof, and shall be completed within the time stated in the same paragraph of said specifications, with the provision that the entire work shall be completed within seventy-five (75) days after the date of receipt of notice to proceed."

Attached to said contract and made a part thereof were the specifications, Section 1-02 of which reads as follows:

"LOCATION—The plant site to be graded in accordance with the plans and these specifications is located in the SE $\frac{1}{4}$ of Section 14 and the east half (E $\frac{1}{2}$) of Section 23, Twp. 11 N., Range 2 west (2W) of the I. M., approximately seven (7) miles southeast of the business district of Oklahoma City, Oklahoma."

Section 1-15 of said specifications reads as follows:

"DRAWINGS

(a) GENERAL—The work shall conform to the following drawings entitled "Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma," with subjects and file numbers as follows:

SUBJECT	FILE NUMBER
Location Map	GI
Plot Plan	G3

4 "The above drawings form a part of these specifications. The originals are on file at the office of The Austin Company, Skirvin Tower Hotel, Oklahoma City, Oklahoma."

Section II (2) (e) reads as follows:

"Conflicts—

"(1) In case of conflict between the plans and specifications, the specifications shall govern over the plans.

"(2) In case of conflict between the standard articles of the contract and the plans and specifications, the plans shall

govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract.

"(3) In case of conflict between the general provisions, and special provisions of the specifications, the special provisions shall govern."

A copy of said contract (with immaterial parts omitted) is attached hereto, marked Exhibit "B," and a copy of said specifications (with immaterial parts omitted) is attached hereto, marked Exhibits "C". A copy of said location map GI is not attached hereto for the reason that Plaintiffs do not have a copy of same, but same is available to this Court, as will be hereinafter noted.

Thereafter plaintiffs proceeded with their performance of said contract in strict compliance with the terms and provisions of the contract and specifications, and completed same.

Plaintiffs further state that subsequently and on or about June 17, 1942, plaintiffs were directed to grade the area (known as taxiway) outside the location of the plant site, which area was on the site of the Oklahoma City Air Depot; another project.

Plaintiffs at first refused so to do, and insisted upon written demand that said work be done. A copy of said written demand is hereto attached, marked Exhibit "D" and made a part hereof. Plaintiffs acceded to this request, contending, however, that same was not within the purview of the contract and specifications. A copy of said assent is attached hereto, marked Exhibit "E" and made a part hereof. Plaintiffs reiterated their position in letters of June 22, 1942, and July 6, 1942, copies of which letters are attached hereto, marked Exhibits "F" and "G", and made a part hereof. Plaintiffs thereafter filed a claim for additional payment, which claim was denied under a Findings of Fact letter dated October 1, 1942, a copy of which is hereto attached and marked Exhibit "H", and in this letter the United States Engineer made the following statement and admission, "The areas designated on the plans as Taxiway Proposed and Entrance D are not within the bounds of the location of the plant site as set out in paragraph 1-02 of the specifications."

Within the period provided for in the contract and on October 8th, 1942, plaintiffs filed their answer to said Findings of Fact letter, a copy of which is hereto attached and made a part hereof, marked Exhibit "I". Thereafter said matter was filed before the War Department Board of Contract Appeals under BCA No. 167, and on January 20, 1944, said appeal was denied.

Plaintiffs further state that by virtue of the provisions of Section 15 of the contract, all disputes concerning questions of fact shall be decided by the contracting officials, but requires the contractor to proceed with the work as directed. That the ques-

tion involved, as disclosed by plaintiffs' petition, was a question of law, and that the Engineer has no jurisdiction under the terms of the contract to determine questions of law.

Plaintiffs further show that under Section 2-16 of the specifications there is a similar provision and requires the contractor to continue the work and sets forth the manner of appeal.

Plaintiffs further show that the matter was on appeal, and not as trial *de novo*, and that the Judge Advocate General of the United States has rendered an opinion that said Board of Contract Appeals has no jurisdiction on matters of this nature wherein the question is one of law rather than of fact. Op. J. A. G.-S. P. J. G. C. 1943/2811, 2/13/43.

Said plaintiffs state that they are the sole owners of said claim and that no assignment or transfer of the same or any part thereof or interest therein has been made.

Plaintiffs further state that by virtue of a renegotiation agreement, dated April 7, 1944, it was agreed that in the event the plaintiffs recover in excess of \$142,330.00 on the claims asserted under said contract, such amount in excess of said sum will constitute profits which should be eliminated and recovered by the United States.

There has been recovered on said claims the sum of \$24,413.49.

7 Plaintiffs further state that the grading which they were required to do on the taxiway, which is the area outside the site of the Oklahoma City Aircraft Assembly Plant, and not within their contract, was done at a greater cost and that the total yardage therein was 298,873 yards. That plaintiffs are entitled to payment of their claim for same of 84¢ per yard, of which 24¢ per yard has been paid, leaving a balance due these plaintiffs of \$179,323.80, after allowing all charges, credits and offsets, except as regards the renegotiations agreement above set forth.

Wherefore, plaintiffs respectfully pray that this Honorable Court find and adjudge that the United States of America is indebted to them in the sum of \$179,323.80, with interest, by reason of the work done by the plaintiffs at the insistence and request of the United States of America, and which work plaintiffs contend was not within the purview of the contract, and that the Court enter a judgment therefor against the United States of America and order said sum paid.

SPIERS & BODOVITZ,
By V. J. BODOVITZ,
Attorneys for Plaintiffs.

Duly sworn to by V. J. Bodovitz. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

War Department
U. S. ENGINEER OFFICE
P. O. Box No. 61
416 Wright Building
Tulsa, Oklahoma

April 4, 1942

Refer to File No.
O.A.A.P. 316/93
Ref. A-5
Subject: Contract No. W-957-eng-852.

Received Aircraft Assembly Plant, Oklahoma City, Okla., Apr.
6, '42 AM.

To: J. W. Moorman & Son
715 Wells Roberts Hotel
Oklahoma City, Oklahoma

Gentlemen:

1. The United States of America, acting through the undersigned Contracting Officer, hereby places an order with you that you shall furnish the material and perform the work necessary for the construction and completion of approximately 1,000,000 cu. yds. of grading (excavation) at the site of the Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma, in strict accordance with specifications, schedules and drawings, all of which are made a part hereof or which will be furnished to you prior to April 8, 1942. The work referred to shall be started on or before April 8, 1942, and shall be completed on or before June 22, 1942. The price for such construction work will be as agreed upon in accordance with negotiations held with you on April 2, 1942, such unit price being twenty-four cents per cu. yd. for the approximate quantity involved.

2. Funds for carrying out this construction work have been appropriated and are now available for use of the War Department under procurement authority Eng. 19360 P1-32 A.0141-03.

3. The Secretary of War finds that it is in the interest of the war effort that this work be not delayed awaiting the negotiation of a formal contract.

4. Pending the execution of such formal contract, each subcontract, orders for material, equipment, other expenditures, and any commitment made in furtherance of the performance of this contract, entered into by you for a sum in excess of \$2000 shall be subject to the prior written approval of the Contracting Officer.

5. It is contemplated that this contract will be supplemented by the execution of a formal contract between you and the United States of America following, in general, U. S. Standard Form, 10 No. 23, Revised. That contract will include an appropriate clause providing for the termination of the contract for the convenience of the United States of America. All applicable contract clauses required by Federal Laws, Executive Orders, and Army Regulations to be incorporated in such contracts are hereby incorporated herein by reference and will be incorporated in the formal contract and in all subcontracts hereunder.

6. Any claim arising under this contract and any contract supplementing it may be assigned pursuant to the terms of the Assignment of Claims Act of 1940 unless the subject-matter of this contract has been classified as secret, confidential or restricted, and any claims arising under this contract shall not be subject to reduction or not off for any indebtedness of the assignor to the United States arising independent of this contract.

7. In the event the United States of America is unable to negotiate with you a satisfactory contract to supplement this contract prior to April 20, 1942, this contract will terminate and you will be reimbursed for all costs incurred by you in connection with the performance of this contract plus such other sums as have actually been expended by you, in good faith, in settlement of all obligations, commitments and claims which you may theretofore have incurred, but in any event such payments shall not exceed the sum of \$240,000. Upon such payment title to all material, equipment, work in process, and all other things procured or produced by you in 11 the performance of this contract shall vest in the United States of America.

8. If the foregoing is acceptable to you, it is desired that you so indicate hereon and on the inclosed two copies of this letter and return the original and two copies to the Contracting Officer on or prior to April 8, 1942. Such acceptance will constitute this order a contract.

For the District Engineer:

Very truly yours,

Lt. Col., Corps of Engineers,
BRUCE D. RINDLAUB,
Executive Assistant.

Accepted April 7, 1942. J. W. Moorman & Son, (Name of Contractor). 715 Wells-Roberts Hotel, Oklahoma City, Oklahoma. By J. W. Moorman, partner. (Name and Official Title.)

EXHIBIT "B" TO PETITION

Contract No. W-957-eng-851

CONTRACT

(Construction)

U. S. Standard Form No. 23-Rev.

APPROPRIATION: 210/30141 Expediting Production of Equipment and Supplies for National Defense, 1940-43.

War, Engineer Department at Large,
U. S. Engineer Office,
Tulsa, Oklahoma

(Department)

J. W. Moorman & Son, Contractor

12 Contract for grading plant site. Amount, \$240,000.00 (approx.)

Place, Oklahoma City Aircraft Assembly Plant, approximately seven miles southeast of Oklahoma City, Oklahoma.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, are chargeable to procurement authorities below enumerated, the available balances of which are sufficient — cover the cost thereof.

Eng—19360 P101-10 A 0141-03

ANMB Preference A-1-a

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 3rd day of April, 1942, by THE UNITED STATES OF AMERICA hereinafter called the Government, represented by the contracting officer executing this contract, and J. W. MOORMAN & SON, a partnership consisting of Jeff W. Moorman and Jim C. Moorman of the city of Oklahoma City in the State of Oklahoma, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

13 ARTICLE 1. *Statement of work.*—The contractor shall furnish the materials, and perform the work for grading the site of the Oklahoma City Aircraft Assembly Plant, consisting of approximately 1,000,000 cubic yards of earthwork, approximately seven miles southeast of Oklahoma City, Oklahoma, in accordance with the specifications attached hereto and made a part hereof, for the consideration of twenty-four cents (\$0.24) per cubic yard of grading (earthwork), satisfactorily completed and accepted by the Government in strict accordance with the specifications, sched-

ules, and drawings, all of which are made a part hereof and designated as follows: Specifications for grading of Plant Site, Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma, as modified by Addendum No. 1, dated March 31, 1942, and the drawings referred to in paragraph 1-15 of the specifications.

The work shall be commenced as provided for in paragraph 1-05 of the specifications attached hereto and made a part hereof, and shall be completed within the time stated in the same paragraph of the said specifications, with the provision that the entire work shall be completed within seventy-five (75) days after the date of receipt of notice to proceed.

ARTICLE 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract
14 the work shall be delivered complete and undamaged.

ARTICLE 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall

excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work sub-surface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

ARTICLE 5. *Extras.*

ARTICLE 6. *Inspection.*

ARTICLE 7. *Materials and workmanship.*

ARTICLE 8. *Superintendence by contractor.*

ARTICLE 9. *Delays—Damages.*

ARTICLE 10. *Permits and care of work.*

ARTICLE 11. *Eight-hour law—Overtime compensation—Convict labor.*

ARTICLE 12. *Covenant against contingent fees.*

ARTICLE 13. *Other contracts.*

ARTICLE 14. *Officials not to benefit.*

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 16. *Payments to contractors.*

ARTICLE 17. *Rate of wages.*

ARTICLE 18. *Domestic preference.*

ARTICLE 19. *Nonrebate.*

ARTICLE 20. *Additional security.*

ARTICLE 21. *Definitions.*

ARTICLE 22. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto: See pages (8a), (8b), (8c), (8d), (8e), and (8f), hereof.

CONTRACT

ARTICLE 3. *Changes.*ARTICLE 9. *Delays—Damages.*ARTICLE 19. *Nonrebate.*ARTICLE 23. *Termination for Convenience of the Government.*

SPECIFICATIONS

2-26. *Accident Prevention.*

Paragraph 2-16. *Claims, Protests and Appeals*, hereof was deleted and the following substituted therefor:

"2-16. *Claims, Protests, and Appeals.*

17 (a) If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified, and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive.

"(b) All appeals from decisions of the contracting officer authorized under the contract shall be addressed to the Secretary of War, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor in the contract."

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,
By BRUCE D. RINDLAUB,

*Lt. Col., Corps of Engineers,
Executive Assistant,
(Contracting Officer.)*

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J. W. MOORMAN & SON,

By J. W. MOORMAN,

Contractor,

*Partner,
Wells Roberts Hotel, Okla. City, Okla.*

Two witnesses:

Eve Davis,
A. G. Franks.

This contract is authorized by the Third Supplemental National Defense Appropriation Act, 1942, approved Dec. 17, 1941. (Public No. 353, 77th Congress).

EXHIBIT "C" TO PETITION

WAR DEPARTMENT
U. S. ENGINEER AREA OFFICE
OKLAHOMA CITY, OKLAHOMA

Appropriation: 210/30141, Expediting Production of Equipment and Supplies for National Defense, 1940-1943.

Specifications for Grading of Plant Site, Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma.

SECTION I—SPECIAL PROVISIONS

1-01. *General*—These special provisions are a part of the specifications for this contract and shall be consulted in detail for instructions pertaining to this work.

1-02. *Location*—The plant site to be graded in accordance with the plans and these specifications is located in the SE $\frac{1}{4}$ of Section 14 and the east half (E $\frac{1}{2}$) of Section 23, Twp. 11 N, Range 2 west (2 W), of the I.M., approximately seven (7) miles southeast of the business district of Oklahoma City, Oklahoma.

19 1-03. *Work to be Done*—

(a) The work provided for herein is authorized by the Third Supplemental National Defense Appropriation Act, 1942, approved December 17, 1941 (Public No. 353, 77th Congress).

(b) *Nature of Work*—The work to be done under these specifications includes the furnishing of all labor, tools, equipment, materials and supplies necessary for the grading of the plant site including the building sites, roads, aprons, taxiways, permanent parking areas, disposal plant site and all other building site areas shown on the plans, all in accordance with the plans and these specifications.

1-04. *Order of Work*—Work shall be carried on at the location, and in the sequence specified herein or as directed by the Contracting Officer. The work shall be constructed in every part in exact conformity with the location and limit marks established by the Contracting Officer. The grading work under this contract shall begin in the area designated for the temporary building sites and shall be prosecuted with the greatest possible speed. Work at the

north end of the plant site may be carried on concurrently and must be next in the order of work.

1-05. Commencement, Prosecution and Completion—

(a) *Commencement*—The Contractor will be required to commence the work under this contract within forty-eight (48) hours after date of receipt by him of notice to proceed.

SECTION I—SPECIAL PROVISIONS

1-12. Quantities—The following estimate of quantities is given only to serve as a basis of comparison of bids, and for determining the approximate amount of the consideration of the contract. The Contractor will be required to perform the entire quantity of work necessary to complete the work specified in paragraph 1-03 of these specifications, be it more or less than the amount herein estimated.

Item No.	Designation	Unit	Quantity
1	Grading (Excavation)	C.Y.	1,000,000

1-14. Work covered by Contract Price—The Contractor shall, for the contract price, furnish and pay for all materials, labor and all permanent, temporary, preparatory, and incidental work, furnish all accessories, and do everything which may be necessary to carry out the contract in good faith, which contemplates the completion of everything in good working order completed in accordance with the plans and these specifications.

1-15. Drawings—

(a) *General*—The work shall conform to the following drawings entitled "Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma", with subjects and file numbers as follows:

Subject	File Number
Location Map	G1
Plot Plan	G3

The above drawings form a part of these specifications. The originals are on file at the office of The Austin Company, Skirvin Tower Hotel, Oklahoma City, Oklahoma.

SECTION II—GENERAL PROVISIONS

CONSTRUCTION CONTRACT

2-02. Definition of Terms—

(13) *Plans*—The word "plans" shall refer to the plans or drawings made a part of the contract and such additional detail drawings as are necessary for the proper execution and completion of

the work, although such additional plans and drawings may not be prepared until after the commencement of the work.

(15) *Specifications*—The written description of the materials, instructions for the installation of the materials and other information pertaining to the execution of the contract which are a part of the contract documents. The specifications may be altered by supplementary specifications or addenda which will become a part of the contract when issued.

2-03. *Intent of Plans and Specifications*—

(a) *General*—It is the intent of the plans and specifications to describe a completed work to be performed under this contract. Considerable latitude is allowed in these specifications in order that there may be no unfair discrimination against the builders of different styles and types of equipment. For this reason, no omission of any detail from the specifications shall release the Contractor from furnishing any materials or equipment, usual or proper, nor from doing anything necessary for proper and complete construction, unless specifically set forth in the Contractor's proposal.

(e) *Conflicts*—

(1) In case of conflict between the plans and specifications, the specifications shall govern over the plans.

22 (2) In case of conflict between the standard articles of the contract and the plans and specifications, the plans shall govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract.

(3) In case of conflict between the general provisions, and special provisions of the specifications, the special provisions shall govern.

2-16. *Claims, Protests and Appeals*—(Shown in amendment to contract).

SECTION III—TECHNICAL PROVISIONS
GRADING PLANT SITE

3-01. *General*—The special and general provisions bound herewith are a part of this contract and shall be consulted in detail for instructions pertaining to this work.

3-02. *Scope*—The specifications shall govern the grading of the temporary building sites, plant building sites, permanent parking areas, roads, taxiways, aprons, disposal plant site, and all other building sites and areas shown on the plans. The work shall include the furnishing of all labor, tools, materials, equipment and service necessary to perform all grading, grubbing, excavation, embankment and embankment compaction required to complete the grading in accordance with the plans and specifications.

3-03. *Clearing*—All areas shall be cleared of all logs, stumps, trees, brush, poles, fences, vegetation and other obstructions which will interfere with the construction of the plant, except such items

as may be designated by the Contracting Officer to be left in place.

23 3-04. *Grubbing*—

(a) *Embankment Areas*—All areas designated for embankment shall be grubbed, except that where the embankment is to be built to a height of three (3) feet above the ground, the stumps may be cut off at the ground line.

(b) *Excavation Areas*—All areas to be excavated shall be grubbed completely of all stumps and all roots of three-fourths ($\frac{3}{4}$) of an inch in diameter.

3-05. *Disposal of Cleared Materials*—Disposal of all materials except fences shall be by burning or other approved methods and shall be satisfactory to the Contracting Officer. Fence Wires shall be neatly wound on suitable reels, and the wire and such posts as are sound shall be stored in the vicinity of the work as directed by the Contracting Officer. All unsound posts shall be disposed of by burning or other approved methods.

3-06. *Stripping*—Top soil and vegetable matter from all graded areas shall be stripped to a depth of not less than six (6) inches, as directed by the Contracting Officer. The top soil shall be stock piled outside of the limits of construction as directed by the Contracting Officer and shall be preserved for use on unpaved areas after the grading has been completed.

EXHIBIT "D" TO PETITION

THE AUSTIN COMPANY

Engineers and Builders of Defense Facilities for the
WAR DEPARTMENT

Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma

June 17, 1942

J. W. Moorman & Son,
Aircraft Assembly Plant,
Oklahoma City, Oklahoma,

GENTLEMEN:

In accordance with your verbal instructions and your Contract Specifications, Section 1—Special Provisions, paragraphs 1-12 on Quantities, paragraphs 1-15 on Drawings, and Article 2 of your Contract, you are to proceed with the grading west of the depressed tracks and with all areas as shown.

Very truly yours,

THE AUSTIN COMPANY,
C. R. BREWER,

General Superintendent.

EXHIBIT "E"

Oklahoma City, Okla.

June 17, 1942

The Austin Company,
Oklahoma City Aircraft Assembly Plant,
Oklahoma City, Oklahoma,

Attention Mr. C. R. Brewer, General Superintendent

25 GENTLEMEN:

Acknowledging receipt of your letter of June 17th, 1942, requesting that we proceed with the grading west of the depressed tracks and all areas as shown.

We will do this work as requested; doing same, however, under protest.

It is our position that our contract, plans and specifications do not cover the grading called for.

Section 1-02 of the specifications lists the plant site to be graded and describes same, and the area now called for in your letter for grading is outside this location. Therefore it is our position that we do not have a contract covering this additional work called for.

Under Article 15 of the contract, as well as the amendment of the specifications, paragraph 2-16, we submit our protest as above and request that you promptly investigate our complaint and give us your decision in writing.

Yours very truly,

J. W. MOORMAN & SON,
By J. W. MOORMAN.

VJB-Mc.

P. S.—Neither your letter nor the plans and specifications designate the additional work to be done, and we request that you give us this additional information in writing before we can proceed.

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THE UNITED STATES VS. J. W. & J. C. MOORMAN

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EXHIBIT "F" TO PETITION

Oklahoma City, Oklahoma

June 22nd, 1942

The Austin Company,
Oklahoma City Aircraft Assembly Plant,
Oklahoma City, Oklahoma.

Attention: Mr. G. R. Brewer, General Superintendent

Re: Grading additional areas

GENTLEMEN:

On June 17th we wrote you in answer to your letter of June 17th regarding the grading west of the depot site.

We are in receipt of your letter of June 18th ordering the grading of areas 2 and 6.

As you know, previous to your letter we had not been grading area 6, and in our letter of June 17th we stated our reasons.

As requested in your letter of June 18th, we will grade area 6 as ordered; however, we do not abandon our position as set forth in our letter of June 17th and still contend that we have no contract for grading of this area as the plans and specifications do not show this to be within our contract.

We submit you have not complied with the request in our letter and as provided for in the contract and specifications in that you have not given us your decision in writing as to our contention. Will you please do this?

Yours very truly,

J. W. MOORMAN & SON,
By J. W. MOORMAN.

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EXHIBIT "G" TO PETITION

July 6, 1942

The Austin Company,
Oklahoma City Aircraft Assembly Plant,
Oklahoma City, Oklahoma

Attention Mr. G. R. Brewer, General Superintendent

Re: Grading Additional Areas

GENTLEMEN:

May we chronologically detail the events regarding the grading of the additional areas?

On June 17, 1942, you requested that we proceed with the grading west of the depressed tracks and all areas as shown.

We answered by stating that we would do this; under protest, however. Our position was that our contract, plans and specifications did not cover the grading called for and stated in that letter that under Article 15 of the contract, as well as the amendment of the specifications, paragraph 216, we protested the above and requested that you promptly investigate the complaint and give us your decision in writing. In that letter we also requested a more defined statement as to where the work was to be done.

On June 18th you answered, ordering the grading of areas 2 and 6.

On June 22nd, we acknowledged receipt of that letter and agreed to do the work, not abandoning our position as set forth in our letter of June 17th, and still contending that we were under no contract for the grading of this area and requesting again that you investigate and give us your decision in writing.

To this date we have not been furnished with any answer to our letter, nor any decision in writing as to our contention.

We have proceeded and are doing at this time this additional work.

We are making a claim for this additional work, predicated on our consistent position that we have no contract for this work; that the contract and specifications that we have with your company do not cover the areas called for in your letter of June 18th.

It is our position that we have no contract as to this additional work and we will submit a claim therefor on a basis of 84¢ per c.y., which covers the additional work including overhaul and rock excavation and leave us at this time a profit over the actual cost.

Yours very truly,

J. W. MOORMAN & SON,

By —. —.

VJB-Mc.

EXHIBIT "H" TO PETITION

War Department

U. S. ENGINEER AREA OFFICE

Oklahoma City Aircraft Assembly Plant

P. O. Box No. 1945

2309 First National Building

Oklahoma City, Oklahoma

October 1, 1942

Refer to File No. OKP 316/93

29 Subject: Contract No. W-957-eng.-851—Claim No. 5—
Findings of Fact.

To: J. W. Moorman & Son,
P. O. Box, 1982,
Oklahoma City, Oklahoma

GENTLEMEN:

Reference is made to your letters dated June 17, June 22, July 6 and July 15, 1942, wherein you claim additional payment for work which you consider as being outside the requirements of your contract for Grading the Plant Site at the Oklahoma City Aircraft Assembly Plant, located approximately seven (7) miles southeast of Oklahoma City Oklahoma.

I have investigated the facts and my findings are as follows:

a. You were instructed by The Austin Company, as duly authorized representative of the Contracting Officer, to proceed with the grading within the bounds of Ranges 29/00 and 35/75 and stations 63/00 and 80/00. You were furnished a grading plan that designated this area as Grading Area No. 6.

b. Under the provisions of Article 15, "Disputes", of the contract and Paragraph 2-16, Claims, Protests and Appeals of the contract specifications, you may protest any work demanded of you which you consider to be outside the requirements of the contract.

c. You contend that, according to the plans and specifications, as stated in your above-mentioned letters, this area is not within the boundaries of the plant site as defined in paragraph 1-02,
30 and therefore, not a requirement of the contract. You are asking \$0.84 per cubic yard for excavation in this area, which you state covers additional work including overhaul, rock excavation and profit.

d. In direct consideration of this claim we bring to your attention incidents preceding the execution of the formal contract, ex-

cerpts from the Invitation for Bids, the Contract and the contract specifications.

(1.) At the time the drawing, Plot Plan G-3 was being prepared it was known by all concerned, that a taxiway was to be constructed and would be located near the East and West boundaries of the two government properties, the Oklahoma City Air Depot, at that time under construction, and the proposed Oklahoma Aircraft Assembly Plant, respectively. The exact location of this taxiway had not been determined. Since this plan was urgently needed for use with the Invitation for Bids in order to expedite the award of the grading contract, it was not deemed advisable to delay the issuance of said drawing until such time as the exact location of the taxiway could be determined. As the specifications for grading of the plant site provided for the grading of taxiways; to inform prospective bidders of the approximate location of this area for their investigation of the site, this taxiway area was located on the drawings at the proposed location and designated as Taxiway Proposed. The proposed location shown on the drawings proved to be the proper location as later determined. Revised drawings have designated this area as Taxiway "A".

31 (2) With the Invitation for Bids, dated March 26, 1942, Invitation No. 957-42-199 for grading of the plant site the proposed Oklahoma Aircraft Assembly Plant, specifications entitled Grading of Plant Site and drawing, Plot Plan G-3, were furnished.

(3) On the drawing, Plot Plan G-3, furnished with the invitation, there appeared red pencil markings that designated certain areas as included and not included, in grading of the plant site. The area shown on the drawing as Taxiway Proposed, was designated in red pencil as "Taxiway Grading Included In Grading Plant Site". The area shown on the drawing as Entrance "D" was designated in red pencil as "Not Included In Grading Plant Site". Entrances 'A', 'B' and 'C' were designated as "Not Included In Grading Plant Site". The areas designated on the plans as Taxiway Proposed and Entrance 'D' are not within the bounds of the location of the plant site as set out in paragraph 1-02 of the specifications. The areas designated as Entrances 'A', 'B' and 'C' on the drawings are within the bounds of the location of the plant site as set out in paragraph 1-02 of the specifications.

(4) A letter of Intent was issued to you on April 4, 1942, and it was accepted by you on April 7, 1942. In accordance with negotiations held with you on April 2, 1942, the United States of America placed an order with you to furnish the material and perform the work necessary for the construction and completion of approximately 1,000,000 cubic yards of grading (excavation) at the site of the Oklahoma Aircraft Assembly Plant, Oklahoma City, Oklahoma, in strict accordance with specifications,

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schedules and drawings, all of which were made a part thereof. It was contemplated that the Letter of Intent, Contract No. W-957-eng-851, would be supplemented by the execution of a formal contract at a later date.

(5) On April 9, 1942, you proceeded with the work in accordance with instructions contained in the Letter of Intent dated April 4, 1942. As contemplated, the Letter of Intent was supplemented at a later date by the execution of a formal contract, U. S. Standard Form No. 23, Revised, dated April 3, 1942, to which were attached drawings and specifications as referred to in Article 1 of the contract form. Plot Plan G-3, furnished with the formal contract did not bear red pencil markings; however, they clearly delineated the work to be done under the contract, including the Taxiway in question. You signed the contract and the drawings and returned them to this office. You took no exceptions to the contract or drawings.

In the specifications entitled Grading of Plant Site furnished with the formal contract the Scope and Nature of Work is provided as follows:

(6) Specifications—Section I—Special Provisions—Subparagraph 1-03 (b) "Nature of Work"—The work to be done under these specifications includes the furnishing of all labor, tools, equipment, materials and supplies necessary for grading of the plant site including the building sites, roads, aprons, taxiways, permanent parking
33 areas, disposal plant site and all other building site areas shown on the plans, all in accordance with the plans and these specifications.

(7) Specifications—Section II—Subparagraph 2-03(a) provides that it is the intent of the plans and specifications to describe a completed work to be performed under this contract. . . . no omission of any detail from the specifications shall release the Contractor from furnishing any material or equipment, usual or proper, nor from doing anything necessary for proper and complete construction, unless specifically set forth in the Contractor's proposal

(8) Specifications—Section III—Technical Provisions—Paragraph 3-02 "Scope"—These specifications shall govern the grading of the temporary building sites, plant building sites, permanent parking areas, roads, taxiways, aprons, disposal plant site, and all other building sites and areas shown on the plans. The work shall include the furnishing of all labor, tools, materials, equipment and services necessary to perform all grading, grubbing, excavation, embankment and embankment compaction required to complete the grading in accordance with the plans and specifications.

(9) Paragraph VI of the Invitation provides . . . Prospective bidders or their authorized agents are expected to examine the plans and specifications pertaining to the work; to visit the site of the work; to acquaint themselves with all available information,

including local conditions and the availability of labor, and to make their own estimate of the facilities and difficulties attending the execution of the work.

34 In evaluating the above-mentioned facts, it is found that:

a. In paragraph 7 of the Letter of Intent, dated April 4, 1942, provision was made for termination of the contract in the event the Government was unable to negotiate with you a satisfactory contract to supplement the Letter Contract. It is to be noted that the Letter of Intent was written for the reason that it was not practicable to delay commencement of work under the contract pending the preparation of a formal contract and full and complete specifications and drawings. The provision for termination mentioned above gave you an opportunity to take exception to the formal contract and/or completed specifications and drawings when they were delivered to you for examination and acceptance. The records disclose no exception to have been taken by you and that you did sign the formal contract and contract drawings. It must be presumed that you were willing and able to perform all work called for in said contract and drawings.

In view of the foregoing facts, I find that, because of the urgency of the construction program at the time your contract was negotiated, the contract drawings and specifications were not in a stage of completion, as evidenced by the necessity of marking blueprints with red pencil during the negotiations; that you entered into a Letter Contract to perform the work, subject to the provision that such contract would be terminated in the event the United States of America was unable to negotiate with you a satisfactory contract; that you examined and accepted a formal contract prepared subsequent to the date of the Letter Contract, which formal contract

35 included specifications and drawings which clearly require you to grade the Taxiway 'A' at the contract unit price of \$0.24 per cubic yard for excavation; and that you made no protest and took no exception to the formal contract, specifications and drawings at the time of your acceptance thereof.

Therefore, I find, that the work requested of you as set out in this claim is within the requirements of the contract and that the contract unit price bid is just compensation for the work performed. Accordingly, your request for additional payment is denied.

For your information, Article 15 of the contract provides for a method of appeal from decisions of the Contracting Officer, as follows: " * * * "Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decisions shall be final and conclusive upon the parties thereto."

The appeal, addressed to the Chief of Engineers, U. S. Army, Washington, D. C., shall contain all the facts or circumstances upon which the contractor bases his claim for relief and shall be presented to the Contracting Officer for transmittal to the Chief of Engineers, U. S. Army.

Very truly yours,

C. W. POWELL,
2d Lt., Corps of Engineers,
Acting Area Engineer.

EXHIBIT "I" TO PETITION

October 8, 1942

c/o V. J. Bodovitz,
1013 Colcord Bldg.,
Oklahoma City, Oklahoma

Chief of Engineers,
United States Army,
Washington, D. C.

Re: Contract No. W-957-eng-851

DEAR SIR:

Claim No. 5—Findings of Fact

Under date of October 1st the Acting Area Engineer makes findings of fact regarding claims for additional payment for work which contractor considers as being outside the requirement of the contract.

In this letter of October 1st the Acting Area Engineer for the first time acknowledges receipt of letters of June 17th, June 22nd, July 6th and July 15th, although Paragraph 2-16 of the specifications states "the Contracting Officer shall thereupon promptly investigate the complaint and furnish the contractor his decision thereon in writing". Here the prompt investigation and the decision thereon in writing was given long after the contractor had completed the work.

Paragraph 1-02 describes "Location" as follows:

"The plant site to be graded in accordance with the plans and these specifications is located in the SE $\frac{1}{4}$ of Section 14 and the east half (E $\frac{1}{2}$) of Section 23, Twp. 11 N., Range 2 West (2 W), of the I.M., approximately seven (7) miles southeast of the business district of Oklahoma City, Oklahoma."

37 We submit that is controlling and complete answer to the findings set forth in five pages of the letter of October 1st.

It is true the original plan had written on it "Taxiway (Proposed)".

It also had on it indications of various buildings, various water wells and various highways, and if the position is well taken, then likewise this contractor could have been required to have built these buildings, constructed the highways or drilled the water wells. It is far fetched to contend that a proposed taxiway clearly outside of the area involved in the contract comes within the purview of the contract.

Furthermore, there is one other provision that is conclusive. In the contract as signed, Article 2 reads as follows:

"In Case of Difference Between Drawings and Specifications, the Specifications Shall Govern".

The contractor has never had furnished to him, either at the time of the original negotiations or any time subsequent thereto, any plans or drawings with any pencilled notations thereon; and furthermore, states that he never saw any such plans at any time other than at the Field Office of the Assistant Area Engineer long after the work had started and the contract was signed.

In paragraph (5), page 3, comment is made that the contractor signed the contract and the drawings and returned them without taking exceptions to the contract and the drawings. This, we submit, is begging the question. The whole matter and dispute is as to whether the drawings and contract designated the taxiway. The contract, as we just above stated, and specifications expressly omitted any areas other than those expressly and implicitly set forth in the specifications, and it is assuming the very matter in controversy to make the statement that the contractor took no exceptions. Of course he took no exceptions, because he had a right to rely upon the statement in the contract that in case of difference between drawings and specifications, the specifications shall govern; furthermore, there was nothing on the drawings themselves to indicate that he would be required to do this work. The words "proposed taxiway" certainly could cause no more notice of an obligation to do this work than the word "water wells" or "building" on the drawings.

Also, it must be remembered that prior to the time of starting the work the contractor expressly took the position that this work was outside of the area called for in the contract.

It is interesting in passing to consider with these findings of fact on Claim 5 the findings of fact on Claim No. 7. Claim No. 7 covered an industrial road which was likewise outside of the area. The findings of fact in both instances arrived at the same result, to-wit: that they were contemplated in the contract. We submit that apparently these findings of fact were arrived at by taking the result and moving backwards. Because as to the taxiway the con-

tention is made that it was on the blue prints or drawings, but 39-40 in the industrial road case there was no such contention made, but nevertheless the same result was reached.

We submit, therefore, that all of the statements regarding the Invitation for Bids, the letter of Intent, and the drawings, are clearly beside the point and ignore the express provisions of the contract above referred to and the specifications above referred to, and we further submit that there is no tenable position for any finding that this contract covered excavation work outside of the limited areas as set forth in the plans and specifications.

Yours very truly,

J. W. MOORMAN & SON,
By

JWM-Mc.

41-42

GENERAL TRAVERSE—Filed July 2, 1945

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

WAS
EEE

(s.) FRANCIS M. SHEA,
Assistant Attorney General.

ARGUMENT AND SUBMISSION OF CASE

On June 2, 1948, the case was argued and submitted on merits by Mr. V. J. Bodovitz for plaintiffs, and by Mr. William A. Stern II for defendant.

43 Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J.—Filed March 7, 1949

Mr. V. J. Bodovitz for the plaintiff.
Mr. William A. Stern, II, with whom was Mr. Assistant Attorney General H. G. Morison, for the defendant.

The plaintiff partnership entered into a contract with defendant for the grading of the site of the Oklahoma City Aircraft Assembly Plant. It alleges that defendant required it to perform grading and excavation not called for by the contract, the specifications or the drawings. The contracting officer and the head of the department interpreted the contract as including the work in question, and plaintiff was paid for such work at the contract unit price of 24 cents per

cubic yard. Plaintiff seeks to recover \$179,323.80 as payment for grading 298,973 cubic yards at 84 cents per cubic yard, less 24 cents per cubic yard already paid. Because of a renegotiation agreement entered into by plaintiff and defendant, plaintiff's recovery may not exceed \$117,916.51, plus interest computed thereon.

Defendant contends (1) that the work in question was within the terms of plaintiff's contract and that it has been fully paid therefor; and (2) that the decision of the head of the department was final and conclusive.

SPECIAL FINDINGS OF FACT

1. Jeff W. Moorman and James C. Moorman are copartners doing business as J. W. Moorman & Son, in Oklahoma City, Oklahoma.

44 March 26, 1942, the defendant, acting through the Corps of Engineers, War Department, sent to a number of prospective bidders, including plaintiff, Invitation for Bids No. 957-42-199, for the "Grading of Plant Site, Oklahoma City Aircraft Assembly Plant." Accompanying each invitation was a set of specifications and certain plans, designated as Location Map G-1 and Plot Plan G-3. These plans were drafted March 2, and March 6, 1942, respectively, and Location Map G-1 was approved by the office of the Chief of Engineers March 20, and Plot Plan G-3 was approved March 26, 1942. On the drawing, Plot Plan G-3, the defendant at some time, not appearing from the record, made certain red pencil markings which designated areas outside of the Aircraft Assembly Plant site as included and certain areas within such site as not included in the grading and excavation work for the Aircraft Assembly project. The plot plan drawing G-3 furnished to plaintiff with the invitation for bids and with the contract subsequently made, did not have on it such markings, nor was any reference made to such changes in this drawing in the contract, and plaintiff had no knowledge of any intention by defendant to make such changes in this drawing until long after the contract had been made.

2. The specifications furnished plaintiff with the invitation, and later incorporated in its formal contract, without material change, contained the following provisions in Section I, Special Provisions, with respect to the location and property description, nature and order of the work:

1-02. *Location.*—The plant site to be graded in accordance with the plans and these specifications is located in the SE¼ of Section 14 and the east half (E½) of Section 23, Twp. 11 N., Range 2 west (2W), of the I. M., approximately seven (7) miles southeast of the business district of Oklahoma City, Oklahoma.

1-03. *Work to be done.*—

• • • • • • •

(b) *Nature of work*—The work to be done under these specifications includes the furnishing of all labor, tools, equipment, materials and supplies necessary for the grading of the plant site including the building sites, roads, aprons, taxi-ways, permanent parking areas, disposal plant site and all other building site areas shown on the plans, all in accordance with the plans and these specifications.

1-04. *Order of work*.—Work shall be carried on at the location, and in the sequence specified herein or as directed by the Contracting Officer. The work shall be constructed in every part in exact conformity with the location and limit marks established by the Contracting Officer. The grading work under this contract shall begin in the area designated for the temporary building sites and shall be prosecuted with the greatest possible speed. Work at the north end of the plant site may be carried on concurrently and must be next in the order of work.

Paragraph 1-15 of the Specifications related to the drawings and provided:

1-15. *Drawings*.—

(a) *General*.—The work shall conform to the following drawings entitled "Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma," with subjects and file numbers as follows:

<i>Subject</i>	<i>File Number</i>
Location Map	G1
Plot Plan	G3

The above drawings form a part of these specifications. The originals are on file at the office of The Austin Company, Skirvin Tower Hotel, Oklahoma City, Oklahoma.

Plot Plan G-3 showed certain areas adjacent to the main Aircraft Assembly Plant and the aircraft hangar building which were to be graded for hard surfacing, and which areas fully answered the description of "taxi-ways" mentioned in paragraph 1-03 (b), above. This plan definitely indicated a "taxi-way" 400' x 50' leading to the Compass Checking Station. Plan G-3 also showed, among other things, that the Assembly Building was to be 3,220 feet long and varying in width from 726½ feet at the north end down to 150 feet at the south end. Adjacent to the south half of this building was shown on the east side an area to be graded for hard surfacing with "Asphaltic Concrete" for a length of 2,800 feet and a width of

100 feet. This strip was shown as leading to and connecting with the 400' x 50' concrete taxi-way leading to the Compass Checking Station, about 1,100 feet southeast of the Assembly Building. Likewise, this plan showed certain adjacent areas to the west 900 feet long and south of the south end of the Assembly Building 950 feet long, which were to be graded for hard surfacing with asphaltic concrete. While none of these areas was specifically marked on the plan as "taxi-ways," it was obvious from the drawing and the kind of plant to be erected on the site to be graded, that they were intended for use as "taxi-ways," in moving aircraft assembled in the Assembly Building to the Compass Checking Station and to the aircraft Hangar, 763' x 200', and the Paint Shop, shown on the plan as being located about 450 feet southwest of the south end of the Assembly Building. Adjacent to the aircraft Hangar and the Paint Shop was an area to be graded which was 1200' x 250' and designated on the drawing as "Concrete Apron."

Location Map G-1 is a blueprint, showing several miles of the area surrounding the "Aircraft Assembly Plant" and the "Midwest Air Depot," and the location of the assembly plant site thereon conforms exactly to the range and section description contained in the above quoted paragraph 1-02 of the specifications.

Plot Plan G-3 is a detailed drawing of the assembly plant site showing Range 29 as the west boundary line by the words "property line." North of Station 80+ is a line marked as the north property line. The south and east limits of the project are similarly marked.

The specifications related specifically to the work to be performed on the Aircraft Assembly Plant site and no mention was made anywhere in the specifications of the Midwest Air Depot to the west of the Assembly Plant site. The drawings G-1 and G-3 furnished to plaintiff indicated by the detailed information shown thereon, that they were prepared for the purpose of indicating the grading and excavation work to be performed on the Aircraft Assembly site in accordance with the specifications, and that they were not intended to include in connection with such work any grading or excavation within the Midwest Air Depot site or in any areas outside of the property lines of the Aircraft Assembly Plant shown thereon.

3. Prior to making its bid, plaintiff visited the site of the project with the specifications and drawings in its possession and observed that west of the Assembly Plant property line (at Range 29) and separated from it by a wire fence, was an air depot and air-field, another Government project then under construction. Guards were posted at intervals along the fence and plaintiff saw that some grading work was then being done on the air depot site. Plaintiff's Plot Plan G-3 showed a small portion of the air depot (designated as Midwest Air Depot) and indicated in general

certain installations thereon, including airfield runways with connecting and parallel taxiways. This plot plan also showed a road north and east of the Assembly Plant west property line and leading to Entrance D of the assembly plant site. From a reading of the specifications and drawings and an examination of the site, plaintiff interpreted the specifications and drawings as calling only for the performance of the grading work shown within the Aircraft Assembly Plant site, and made its bid accordingly. This interpretation by plaintiff of the specifications and plans furnished to it by defendant was, in every way, reasonable. Plaintiff made no actual inspection outside the plant site limits as defined in paragraph 1-02 of the specifications and as indicated by the four "property line" boundaries marked on Plot Plan G-3, and by the cross-hatched area on Location Map G-1.

4. The specifications estimated that the quantity of grading to be done in the assembly plant area under the proposed contract would be approximately 1,000,000 cubic yards, and plaintiff concluded that this estimate was substantially correct. Plaintiff submitted a bid of 24 cents per cubic yard which was accepted by defendant. On April 4, 1942, defendant sent to plaintiff a "Letter Contract" which was accepted by plaintiff on April 7. On April 9, 1942, plaintiff commenced work and, about June 1, 1942, plaintiff and defendant executed a formal contract effective as of April 3, 1942.

5. The formal contract, in all respects pertinent to plaintiff's claim, followed the form of U. S. Standard Form No. 23, Revised, including the standard Articles 3, 4 and 5, covering changes, changed conditions, and extra work, and the standard Article 15 providing for determination of all disputes concerning questions of fact by the contracting officer, subject to written appeal within 30 days.

6. Pursuant to paragraph 2-09 of the specifications, the Austin Company was designated Architect-Engineer-Manager (hereinafter referred to as A-E-M) with full authority to act for the contracting officer in supervising plaintiff's work under the contract, and directing its operations.

7. The specifications also contained in paragraph 2-16 the usual provision with reference to "Claims, Protests and Appeals." This paragraph, as it appeared in the original specifications, provided for appeal to the Chief of Engineers, U. S. Army, as the head of the department, and referred to Article 15 of the Contract. The only change made in the substance of this paragraph when the contract was prepared and signed, was the provision that all appeals should be taken and addressed to the Secretary of War instead of the Chief of Engineers. Before as well as after it was changed, the paragraph contained the provision that "If the contractor is not satisfied with

the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract."

Section III, entitled "Technical Provisions, Grading Plant Site," relating to clearing, grubbing, disposal of materials, stripping, excavation, embankment work, finishing, and measurement for payment, contained the following paragraph:

3-02. *Scope.*—The specifications shall govern the grading of the temporary building sites, plant building sites, permanent parking areas, roads, taxiways, aprons, disposal plant site, and all building sites and areas shown on the plans. The work shall include the furnishing of all labor, tools, materials, equipment and service necessary to perform all grading, grubbing, excavation, embankment and embankment compaction required to complete the grading in accordance with the plans and specifications.

8. June 17, 1942, defendant, through the A-E-M, wrote plaintiff, as follows:

In accordance with our verbal instructions and your Contract Specifications, Section 1—Special Provisions, Paragraph 1-12 on Quantities, Paragraph 1-15 on Drawings, and Article 2 of your Contract, you are to proceed with the grading west of the depressed tracks and with all areas as shown.

49 9. On the same date, plaintiff wrote defendant, as follows:

Acknowledging receipt of your letter of June 17th, 1942, requesting that we proceed with the grading west of the depressed tracks and all areas as shown.

We will do this work as requested; doing some, however, under protest.

It is our position that our contract, plans and specifications do not cover the grading called for.

Section 1-02 of the specifications lists the plant site to be graded and describes same, and the area now called for in your letter for grading is outside this location. Therefore it is our position that we do not have a contract covering this additional work called for.

Under Article 15 of the contract, as well as the amendment of the specifications, paragraph 2-16, we submit our protest as above and request that you promptly investigate our complaint and give us your decision in writing.

• • • • •

P. S.—Neither your letter nor the plans and specifications designate the additional work to be done, and we request that you give us this additional information in writing before we can proceed.

10. June 18, 1942, defendant replied, as follows:

You are hereby ordered to go on grading areas Nos. 6 and 2. Grading area No. 6 identified from Range 29+00 to Range 35+75; Station 63+00 to Station 80+00.

Grading area No. 2 identified from Range 12+00 to Range 29+00; Station 55+00 to 68+00.

Grading area No. 6 is needed at the earliest possible date for the erection of concrete plant for Leo Saunders Construction Company.

Attached, herewith, is Grading G-3 Plot Plan, subdivided into ten grading areas.

11. Grading Area No. 6 as shown on the subdivided plot plan sent to plaintiff by defendant with the above-quoted order, covered a portion of the taxiway in the "Midwest Air Depot" west of Range 29 and extended west to the edge of the Air Depot North-South concrete runway. Subsequently, plaintiff was required under the order to grade all of the taxiway. This grading took plaintiff about 1,400 feet beyond the northern boundary of the "Aircraft Assembly Plant" and some seven hundred feet west of Range 29 for the entire length of the Midwest Air Depot taxiway.

50 During the course of the contract performance, defendant eliminated some of the grading that had been contemplated by both parties on the assembly plant site south of the temporary building site, but there is no issue concerning this.

12. June 22 and July 6, 1942, plaintiff wrote to the A-E-M renewing its request for an investigation of its complaint as set forth in its letter of June 17, 1942, and a decision, pursuant to Article 15 of its contract and paragraph 2-16 of the specifications. On July 15, 1942, plaintiff again wrote to the A-E-M, as follows:

We are herewith submitting Claim #5 for yardage moved under protest which we contend is out of the bounds of our contract west of Range 29 better known as Taxiway. This yardage amounts to 123,322 C. Y. We are asking as you have been notified in writing, 84¢ per C. Y. which amounts to \$103,590.48. This includes rock excavation and overhaul which we feel is not unreasonable.

13. Plaintiff duly completed its contract and the Government duly accepted the work but paid plaintiff only the original contract price of 24 cents per cubic yard for all excavation.

14. October 1, 1942, defendant's Acting Area Engineer rendered a decision adverse to plaintiff's claim. This decision read, in part, as follows:

d. In direct consideration of this claim we bring to your attention incidents preceding the execution of the formal contract, excerpts from the Invitation for Bids, the Contract and the contract Specifications.

(1) At the time the drawing, Plot Plan G-3, was being prepared it was known by all concerned, that a taxiway was to be constructed and would be constructed and would be located near the East and West boundaries of the two Government properties, the Oklahoma City Air Depot, at that time under construction, and the proposed Oklahoma Aircraft Assembly Plant, respectively. The exact location of this taxiway had not been determined. Since this plan was urgently needed for use with the Invitation for Bids in order to expedite the award of the grading contract, it was not deemed advisable to delay the issuance of said drawing until such time as the exact location of the taxiway could be determined. As the specifications for grading of the plant site provided for the grading of taxiways; to inform prospective bidders of the approximate location of this area for their investigation of the site, this taxiway area was located on the drawings at the proposed location and designated as Taxiway Proposed. The proposed location shown on the drawings proved to be the proper location as later determined. Revised drawings have designated this area as Taxiway "A".

(2) With the Invitation for Bids, dated March 26, 1942, Invitation No. 957-42-199 for grading of the plant site of the proposed Oklahoma Aircraft Assembly Plant, specifications entitled Grading of Plant Site and drawing, Plot Plan G-3, were furnished.

(3) On the drawing, Plot Plan G-3, furnished with the invitation, there appeared red pencil markings that designated certain areas as included and not included, in grading of the plant site. The area shown on the drawing as Taxiway Proposed, was designated in red pencil as "Taxiway Grading Included in Grading Plant Site." The area shown on the drawing as Entrance "D" was designated in red pencil as "Not Included In Grading Plant Site". Entrances "A", "B", and "C" were designated as "Not Included in Grading Plant Site". The areas designated on the plans as Taxiway Proposed and Entrance "D" are not within the bounds of the location of the plant site as set out in paragraph 1-02 of the specifications.

.

* * * Plot Plan G-3, furnished with the formal contract did not bear red pencil markings; however, they clearly delineated the work to be done under the contract, including the Taxiway in question. You signed the contract and the drawings and returned them to this office. You took no exceptions to the contract or drawings.

* * * * *

In view of the foregoing facts, I find that, because of the urgency of the construction program at the time your contract was negotiated, the contract drawings and specifications were not in a stage of completion, as evidenced by the necessity for marking blueprints with red pencil during the negotiations; * * * that you examined and accepted a formal contract prepared subsequent to the date of the Letter Contract, which formal contract included specifications and drawings which clearly require you to grade the Taxiway "A" at the contract unit price of \$0.24 per cubic yard for excavation; and that you made no protest and took no exception to the formal contract, specifications, and drawings at the time of your acceptance thereof.

52 Therefore, I find, that the work requested of you as set out in this claim is within the requirements of the contract and that the contract unit price bid is just compensation for the work performed. Accordingly your request for additional payment is denied.

15. On the same date, October 1, 1942, defendant's Acting Area Engineer rendered another decision on plaintiff's claim 7, relating to the grading of an industrial road within the Midwest Air Depot area and which work plaintiff claimed was not required under their contract for grading the assembly plant site. This decision was likewise adverse to plaintiff's claim.

16. October 8, 1942, plaintiff appealed from the denials of its claims to the Secretary of War, stating, in part:

It is true the original plan had written on it "Taxiway (Proposed)".

It also had on it indications of various buildings, various water wells and various highways, and if the position is well taken, then likewise this contractor could have been required to have built these buildings, constructed the highways or drilled the water wells. It is farfetched to contend that a proposed taxiway clearly outside of the area involved in the contract comes within the purview of the contract.

* * * * *

The contractor has never had furnished to him, either at the time of the original negotiations or any time subsequent thereto, any plans or drawings with any pencilled notations thereon; and furthermore, states that he never saw any such plans at any time other than at the Field Office of the Assistant Area Engineer long after the work had started and the contract was signed. [Plaintiff first saw the red pencilled plans when the written order of June 18, 1942, was issued.]

* * * * *

It is interesting in passing to consider with these findings of fact on Claim 5 the findings of fact on Claim No. 7. Claim No. 7 covered an industrial road which was likewise outside of the area. The findings of fact in both instances arrived at the same result, to wit: that they were contemplated in the contract. We submit that apparently these findings of fact were arrived at by taking the result and moving backwards. Because as to the taxiway the contention is made that it was on the blue-prints or drawings, but in the industrial road case there
53 was no such contention made, but nevertheless the same result was reached.

7. Plaintiff's claims were referred to the War Department Board Contract Appeals. On January 20, 1944, that Board rendered decision adverse to plaintiff with respect to its claim for grading Midwest Air Depot taxiway. This opinion contained no mention of the blueprint Plot Plan G-3 marked in red. In its opinion Board stated:

As counsel for appellant has raised some question about the power of this Board to pass on questions of law, although, apparently, he is not averse to a decision by the Board, it may be well to state, that in cases of contracts, such as the present, containing a Claims, Protests and Appeals clause, the Board has adopted the policy of deciding questions of law. In the present case, the controversy falls directly under the first sentence of that clause, which reads: "If the contractor considers any work demanded of him to be outside the requirements of the contract * * *." That is just the contention here—that the grading of the taxiway is outside the requirements of the contract. Under the Claims, Protests and Appeals clause, a ruling by the contracting officer upon that question, adverse to appellant, is an appealable ruling. For the reasons given the appeal will be considered on its merits.

There is no escape from the conclusion that the grading contemplated by the contract includes the grading of the taxiway. Specifications 1-03 (b) and 3-02 giving the nature and

scope of the work both use the word "taxiways". Plan G-3 uses the word "Taxiway (proposed)". Article I specifically provides that the specifications and the plans set out in Spec. 1-15 shall govern the work.

Regardless of what appellant may have had in mind originally as to the taxiways, there is no question about the fact that the contract was signed with these provisions and this plan as a part thereof, and no exception was made as to that particular grading.

It is appellant's theory, however, that special condition 1-02 (par. 3 above) is a limitation of the area in which appellant was to work, and that anything outside that area is extra work. The Board does not agree with that interpretation. "Location" is merely a means of identifying the project, and not of limitation upon the scope of the work. Were it possible to show that no part of the present project was in the sections of
54 land designated, there might be a good argument that it was not the project covered by this contract; but that is not the fact here. "Location" answers the question "Where?", not the question "How much?".

18. June 27, 1944, the Board rendered its opinion on plaintiff's appeal with respect to the industrial road grading and reversed the decision of the contracting officer. In its opinion the Board referred to the opinion of January 20, 1944, relative to the taxiway and approved that portion of the opinion interpreting paragraph 1-02 of the specifications "Location". In sustaining plaintiff's appeal on the road claim, the Board distinguished the two cases as follows:

However, there are other considerations brought forth in the hearing on this appeal that do give light on what the intention of the parties was with regard to the grading of this "industrial road." We find that the Government, in requesting bids on this project, definitely indicated on Drawing G-3, the Plot Plan for this particular grading project, that the grading of this "industrial road" (noted as Entrance 'D' on the drawing) was not to be included in the bids.

At this point the Board quoted from the opinion of the Chief of Engineers finding that plaintiffs had received drawings marked with a red pencil at the time of the Invitation for Bids, and said:

Although the appellant denies having seen this particular drawing with the notations above mentioned upon it, and the Drawing G-3 attached to the formal contract did not have on it these notations; nevertheless, such expressions do show the

intention of the Government relative to the grading work to be done on this project at the time bids were requested.

.

All of these circumstances above related, considered in the light of the uncertainty of the specifications and drawings, indicate to the Board that neither party intended at the time the contract was entered into that the appellant would be required to grade the "industrial road" site, and, therefore, the requirement by the contracting officer that the appellant grade this "industrial road" site was extra work not originally contemplated by either party, and the appellant is entitled to be paid a reasonable sum for this work.

19. July 24, 1944, defendant and plaintiff entered into a Supplemental Agreement (Modification No. 9) to cover the grading of the "Industrial Road" at a unit price of 60 cents per cubic yard for 13,676 cubic yards. Plaintiff had been paid for such yardage at the unit price of 24 cents. As a result of this supplemental agreement, plaintiff was allowed \$8,205.60 and paid an additional \$4,923.36. No part of this amount is now in controversy.

20. Plaintiff graded 298,873 cubic yards outside of the Aircraft Assembly Plant area and west of range 29. This grading included the Midwest Air Depot taxiway and excavation in connection with drainage ditches for the drainage of such taxiway.

21. The soil in the Midwest Air Depot area on the west side of Range 29 contained more rock than did the soil on the assembly plant site. It was necessary for plaintiff to drill and blast rock in order to do grading and excavation work west of Range 29.

22. The cost of performing the work west of Range 29, exclusive of overhead and profit, but including a reasonable amount for rental of equipment, was \$158,235.94 consisting of the following items.

Itemized Cost

Equipment rental	\$75,413.99
Labor	43,661.22
Gas, oil, fuel and grease	4,332.00
Supplies and Parts	16,359.00
Shop, repair and maintenance	9,120.00
Insurance, social security and unemployment Comp	7,211.48
Dynamite and blasting supplies	2,138.25

\$158,235.94

The actual cost per cubic yard for grading west of Range 29 was approximately 53 cents. Allowing a reasonable 12 percent for profit and overhead, plaintiff is entitled to 59.3 cents per cubic yard for grading 298,873 cubic yards west of Range 29, or \$177,231.69. Plaintiff has already been paid for this yardage at the rate of 24 cents per cubic yard, or a total of \$71,729.52, leaving a balance of \$105,502.17 due and unpaid.

CONCLUSION OF LAW

Upon the foregoing special findings of fact which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover \$105,502.17.

It is, therefore, adjudged and ordered that plaintiffs recover of and from the United States the sum of one hundred five thousand, five hundred and two dollars, and seventeen cents (\$105,502.17).

OPINION

LITTLETON, *Judge*, delivered the opinion of the court:

The plaintiff partnership, J. W. Moorman & Son, seeks to recover the sum of \$117,916.51 as an additional payment alleged to be due for extra work involving the grading and excavation of 298,973 cubic yards of earth and rock, from an area within a project known as the Midwest Air Depot which plaintiff says was outside the scope of its contract of April 3, 1942, with defendant for certain grading work for the Oklahoma City Aircraft Assembly Plant.

This work was performed as a result of a written order duly issued by the contracting officer June 18, 1942, which plaintiff duly protested in accordance with paragraph 2-16, General Provisions, of the contract specifications. Plaintiff claimed that the work covered by the written order was not called for by its contract; that it was more expensive to perform by reason of its nature and the circumstances and conditions under which it had to be done; and that a price of 84 cents a cubic yard should be paid therefor instead of the original contract unit price of 24 cents.

As shown in finding 14, the contracting officer denied the claim principally on the ground that defendant had made certain red pencil changes on a drawing, known as Plot Plan G-3, which he asserted had been furnished to plaintiff with the invitation for bids (but which plaintiff strenuously denied), showing that the work in question was to be included in the contract for the grading of the aircraft assembly plant site. In addition, the contracting officer resolved all doubts in favor of the Government and reached the conclusion that independently of the red markings in plan G-3, the specifications and original drawings were sufficient to show that the grading and excavation work performed out-

side the Aircraft Assembly Plant site and within the Midwest Air Depot area was to be included within contract for grading the assembly plant site.

After a hearing on plaintiff's appeal, the Board of Contract Appeals, acting for the Secretary of War, affirmed the decision of the contracting officer as to the claim now before the court, and denied plaintiff's claim. In its opinion on this claim (finding 17) the Board did not discuss the changed drawing alleged to have been sent to plaintiff with the invitation for bids and denied the claim on its interpretation of the specifications and original drawings. In a separate opinion on another item of plaintiff's claim for grading an industrial road from a point in the Midwest Air Depot site to entrance "D" of the Aircraft Assembly Plant site, the Board reversed the decision of the contracting officer and concluded that this work had not originally been contemplated by either party. For this extra work, which involved 13,676 cubic yards, plaintiff was allowed 60 cents a cubic yard by the contracting officer.

We are of the opinion that the decisions of the contracting officer and the head of the department cannot be sustained under the facts and the specifications and drawings.

The defendant conceded at the hearing of the case in this court that plaintiff never received the drawing marked in red to indicate that the taxiway and connecting areas, which were a part of the airfield, known as Tinker Field, at the Midwest Air Depot, were to be included in the contract for grading the Aircraft Assembly Plant site. It contends, however, that plaintiff may not recover any additional amount for this work on the ground that the contract clearly required plaintiff to grade the taxiway west of Range 29, because the word "taxi-ways" was used in the specifications in paragraph 1-03 (b), Nature of Work, and in paragraph 3-02, Scope, and the only taxiway designated on the drawings was the one plaintiff was required to grade west of Range 29. Defendant further contends that, in any event, the decisions of the contracting officer and the War Department Board of Appeals to the effect that the work in question was not outside the contract requirements, were final.

58 We cannot agree with defendant's contention that the contract documents clearly require plaintiff to grade the taxiway west of Range 29. Paragraph 1-02 of the specifications (finding 2) describes exactly the limits of the assembly plant site and Location Plan G-1 and Plot Plan G-3, conform exactly to that description as to the assembly plant site. The specifications are designated as "Specifications For Grading of Plant Site, Oklahoma City Aircraft Assembly Plant," and nowhere therein is the Midwest Air Depot airfield mentioned. The fact that Location Plan G-1 showed all of the Midwest Air Depot and airfield site and that Plot Plan G-3, which

was a detail drawing with reference to the assembly plant, was extended west of the assembly plant site so as to show a part of the Midwest Air Depot and airfield, was not sufficient, in view of the provisions of the specifications and other information shown on Plan G-3, to put plaintiff on notice that it would be required or called upon to perform work outside the assembly plant site. Plaintiff so interpreted the specifications and drawings and we have found that its interpretation was reasonable and proper. The changes which defendant found necessary to make in red on drawing G-3 (not furnished to plaintiff) in order to show that certain grading west of Range 29 was to be included in the plant site grading work, support plaintiff's interpretation of the original drawings. The original drawings G-1 and G-3, furnished to plaintiff, were approved by the defendant's district engineer and contracting officer on March 20 and 26, 1942, respectively, and obviously they were intended to conform to the specifications. The invitation for bids was sent out on March 26, 1942.

Paragraph 1-02 specifically defines the boundaries of the plant site and the next paragraph 1-03 (b), Nature of Work, provides that the work to be done under the specifications includes the furnishing of all labor, equipment, etc., necessary for the "grading of the plant site,"—not some other plant site or some other project far or near—"including building sites, roads, aprons, taxiways, permanent parking areas, disposal plant site, and all other building site areas shown on the plans." Plan G-3 designates by name everything mentioned in paragraphs 1-02 and 1-03 (b), except "taxi-ways." However, we think the absence on this drawing of any specific designation of "taxi-ways" mentioned in 1-03 (b) is unimportant, first, because a large plant for assembling airplanes would normally need taxiways within the site to be graded; and, second, because taxiways in the sense in which that term must have been used in paragraph 1-03 (b), Special Provisions, and in paragraph 3-02, Technical Provisions, are clearly shown on drawing G-3 as we have set forth in finding 2. On this plant site the drawing G-3 shows, among other buildings, a large aircraft Assembly Building; some distance southeast thereof is the Compass Checking Station, and some distance west of the compass station and southwest of the Assembly Building are located a large aircraft Hangar and Paint Shop. Plan G-3 clearly shows grading work to be performed for concrete and asphaltic concrete surfacing of these areas, extending along the east and west of the Assembly Building to the other points and buildings mentioned, and between the Compass Checking Station and the Hangar. A certain strip adjoining the Hangar is designated as "Concrete Apron." The other areas mentioned are not designated on the Plan G-3 otherwise than as "Concrete" or "Asphaltic Concrete," but it seems clear enough from a

proper reading of this drawing that it intended to show these areas as "taxi-ways" for moving planes assembled in the Assembly Building to the Compass Checking Station, to the Hangar and Paint Shop, and to the parking areas.

In the circumstances of this case we cannot interpret the word "taxi-ways," as used in paragraph 1-03 of the specifications relating to the assembly plant site, as meaning that the contractor grading that site must also do extensive grading and excavation of ditches for an airfield taxiway 6,600 feet long and 100 feet wide for the existing airfield on the Midwest Air Depot site, some distance west of the assembly plant site. Such an interpretation would, we think, be an unreasonable one. If the description and boundaries set out in paragraph 1-02 and the boundaries shown on Plan G-3, marked "Property Line," could not be relied on, there was then no discernible limit to what the Government intended except its own interpretation. Cf. *Callahan Construction Co. v. United States*, 91 C. Cls. 538, 611; *W. H. Armstrong and Company v. United States*, 98 C. Cls. 519, 527; *John K. Ruff v. United States*, 96 C. Cls. 148, 164. We think there was no reason for plaintiff to suppose, as defendant argues there was, that the Midwest airfield taxiway in question, and shown on the plans, was a necessary part of the Assembly Plant project so that plaintiff should have inquired whether or not it would be required to grade it even though it was located off the plant site limits definitely fixed in the specifications.

We cannot agree with defendant's second argument that plaintiff is barred from recovering on the ground that the decisions of the contracting officer and the War Department Board of Appeals, acting for the head of the department, were final and conclusive by virtue of paragraph 2-16 of the specifications. A similar contention was considered and denied in the case of *E. and E. J. Pfozter v. United States*, 111 C. Cls. 184. The decisions in *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234, and *United States v. Blair*, 321 U. S. 730, cited by defendant, are not in point. Paragraph 2-16 is entitled "Claims, Protests and Appeals" and is primarily a procedural provision intended to provide an orderly method for carrying out the provisions and purposes of Article 15 of the standard formal contract. Such a paragraph in the "General Provisions" of the specifications has itself come to be a standard provision, and, as we pointed out in the *Pfozter* case, *supra*, the fact that the specifications, which are intended to delineate the work to be done and the procedures to be followed, are made a part of the contract by Article 1, does not warrant the conclusion that they override an express provision of the contract. Provisions such as paragraph 2-16 must, if possible, be read and interpreted in the light of and consistent with the provisions of the formal contract. When this is done, there is no conflict between Article 15 and paragraph 2-16.

The standard contract duly prepared and approved by the proper authority of the Government is binding upon the writer of specifications covering a specific project, and such contract provisions control unless they are modified or changed by a proper provision, approved by proper authority, inserted in the article of the contract provided for that purpose. Otherwise, the standard contract itself would be of little, if any, use, and the uniformity of understanding among contractors, contracting officers and others concerned, and the values flowing to the Government as well as to contractors by reason of such standard contract provisions, would not be obtained but would be left in a state of confusion and uncertainty. The history of the preparation and adoption of the standard forms of Government contracts shows that it was for reasons such as above mentioned, among others, that led to the adoption of the standard contract such as we have here.

We think the provision in paragraph 2-16 of the specifications that the decision of the Secretary of War on appeal " * * * shall be final and binding upon the parties to the contract," properly interpreted, means that such decision shall be final and binding to the extent provided in Article 15 of the Contract. Paragraph 2-16 of the original specifications provided that appeals from decisions of the contracting officer should be taken to the Chief of Engineers, U. S. Army, "whose decision shall be final and binding upon the parties to the contract," and stated that he had been designated by the Secretary of War to make "final decision." The paragraph also contained the statement—" (See Article 15 of the Contract.) "

When the formal contract was prepared for execution, the contracting officer inserted certain provisions under Article 22, entitled "Alterations", in which Articles 3, 9, 18 and 19 of the Contract were changed and a new Article 23, "Termination for the Convenience of the Government," was added. In addition, this article stated that the specifications were changed by adding thereto paragraph 2-26, changing paragraphs 2-19 and 2-16, and deleting paragraph 2-22. As re-written, paragraph 2-16 provided for appeals to the Secretary of War instead of to the Chief of Engineers, and left out the parenthetical reference to Article 15 of the contract. However, for the reasons above mentioned, we think the elimination of the reference to Article 15 did not have the effect of changing the substance and meaning of the original paragraph 2-16 as to the extent of the finality of the decisions of the contracting officer and the head of the department. We

62 are also of the opinion that the making of this change in paragraph 2-16 of the Specifications under Article 22, did not have the effect of changing in any way Article 15 of the Contract. This could only have been accomplished by expressly changing or deleting and rewriting Article 15, as was done with reference to certain other articles of the Contract.

The decision of the Board of Contract Appeals was based upon its interpretation of the contract documents which is not a question of fact within the meaning of Article 15. *Pfotzer v. United States, supra*. In view of the facts and for the reasons hereinbefore discussed, we hold that the Board and the Secretary of War erred in denying the claim here involved.

We conclude, therefore, that plaintiff's contract, specifications and drawings did not require plaintiff to grade the airfield taxiway on the Midwest Air Depot site west of property line Range 29, and that there was nothing in the contract, specifications, or drawings furnished to plaintiff to call plaintiff's attention, before it made its bid, to defendant's undisclosed intention to include the taxiway in question within the assembly plant site grading project.

There remains the question of damages.

Plaintiff contends that 84 cents per cubic yard is the proper measure of compensation for the grading west of Range 29. Defendant contends that 84 cents is excessive and that in any event plaintiff has failed to prove any damages. Plaintiff kept a record of its costs for this extra work as it was performed and introduced evidence showing its total actual cost for all the work done west of Range 29, exclusive of profit and overhead, in the amount of \$158,235.94 (finding 22). Defendant has no evidence to show that these costs were erroneous or excessive for the work done. This cost, without profit and overhead expense, amounts to about 53 cents a cubic yard which, we think, was reasonable in the circumstances. The defendant, however, takes exception in its brief to the amount of the item for equipment rental. Some of the machinery on which rental as a part of cost or compensation for the extra work was charged, was owned by plaintiff and some by the Government. The plaintiff paid a certain rental 63-64 rate to the Government for the machinery rented from it and charged the same rate on its books for machinery plaintiff owned and used for this work. Defendant objects to this procedure on the ground that there was no proof as to what plaintiff's ownership costs were nor how much of the total rental paid was paid to the Government for rental of its machinery. From the record we are convinced that the rental figures claimed by plaintiff for various items of machinery and equipment were fair and reasonable and that they were not more than the Associated General Contractor rates customarily charged. Defendant offered no evidence to support its contention that the rental rates were not reasonable.

Plaintiff's actual costs of \$158,235.94 do not include anything for overhead or profit. The actual cost per cubic yard for this extra work was approximately 53 cents. We believe that 59.3 cents per cubic yard, which would include a reasonable amount of 12 percent additional for overhead and profit, consti-

tutes reasonable and fair compensation to plaintiff for such work. In view of plaintiff's actual costs of performing certain grading work northwest of Range 29 and within the Midwest Air Depot site, which the War Department Board of Appeals held to be extra work outside of plaintiff's contract, the contracting officer paid plaintiff 60 cents a cubic yard. Accordingly, we are of opinion that plaintiff is entitled to recover \$105,502.17, representing the difference between \$177,231.69 (298,793 cu. yds. at 59.3 cents) and \$71,729.52 (298,473 cu. yds. at 24 cents), which plaintiff has already been paid.

Plaintiff claims interest, but interest is not allowable on the judgment at this stage of the case under Sec. 2516, U.S.C. Title 28, Revised.

Judgment will be entered in favor of plaintiff for \$105,502.17. It is so ordered.

Howell, *Judge*; Madden, *Judge*; Whitaker, *Judge*; and Jones, *Chief Judge*, concur.

65-66

JUDGMENT OF THE COURT—March 7, 1949

Upon the special findings of fact which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover \$105,502.17.

IT IS THEREFORE ADJUDGED AND ORDERED that plaintiffs recover of and from the United States the sum of one hundred five thousand five hundred and two dollars and seventeen cents (\$105,502.17).

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Clerk's Certificate to foregoing transcript omitted in printing.

Supreme Court of the United States***Order allowing certiorari*****Filed October 10, 1949**

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 837

THE UNITED STATES, PETITIONER

v.

**JEFF W. MOORMAN AND JAMES C. MOORMAN, CO-
PARTNERS, DOING BUSINESS AS J. W. MOORMAN
& SON**

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on March 7, 1949.

OPINION BELOW

The opinion of the Court of Claims (R. 36-42) is reported at 82 F. Supp. 1010.

JURISDICTION

The judgment of the Court of Claims was entered on March 7, 1949 (R. 42). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the Court of Claims may, in the absence of any finding or suggestion of bad faith or gross error, substitute its own judgment with respect to work required to be performed under a government construction contract for that of the head of the contracting agency, despite a specific contractual agreement, consented to by the complaining contractor, that the administrative decision on this issue "shall be final and binding upon the parties to the contract."

CONTRACT PROVISIONS INVOLVED

ARTICLE 15 of the contract provides:

Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraph 2-03 (e) of the specifications provides:

Conflicts—

(1) In case of conflict between the plans and specifications, the specifications shall govern over the plans.

(2) In case of conflict between the standard articles of the contract and the plans and specifications, the plans shall govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract.

(3) In case of conflict between the general provisions, and special provisions of the specifications, the special provisions shall govern.

Paragraph 2-16 of the specifications provides:

Claims, Protests and Appeals.

(a) If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the

records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive.

(b) All appeals from decisions of the contracting officer authorized under the contract shall be addressed to the Secretary of War, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor in the contract.

STATEMENT

Respondent partnership entered into a contract with the United States for the grading of the site of the Oklahoma City Aircraft Assembly Plant (R. 24). During the performance of the contract a dispute arose with respect to whether the grading of a taxiway to an adjacent air depot was called for by the contract (R. 24-25). The contractor performed the work at the contracting officer's direction, but sought additional compensation on the ground that it was not covered by the contract (R. 29-30). After unsuccessfully invoking the machinery which the contract prescribed for the final settlement of disputes, the contractor sued for additional compensation in the Court of Claims and recovered a judgment in the amount of \$105,502.17 (R. 31, 33, 42).

Invitations for bids for the grading contract were sent to prospective bidders, including plain-

tiff, on March 26, 1942 (R. 25). Plaintiff's bid of 24¢ per cubic yard for an estimated quantity of one million cubic yards was accepted (R. 28). A "letter contract" was accepted by plaintiff on April 7, and about June 1, 1942, a formal contract effective as of April 3, 1942, was executed (R. 28).

In all respects pertinent here the formal contract followed the form of United States Standard Form 23 Revised, which contained the standard Article 15 provision for the administrative determination of all disputes concerning questions of fact (R. 28). *Supra*, p. 2. Paragraph 2-16 of the specifications added by the War Department contained the usual provision with reference to "Claims, Protests and Appeals" making final and binding upon the contracting parties the decision of the Secretary of War or his duly authorized representative upon protests with respect to the work required by the contract (R. 28-29, 10). *Supra*, pp. 3-4.

Upon being required to perform the grading of the taxiway in question, plaintiff claimed it was not called for by the contract and submitted its protest under Article 15 of the contract and paragraph 2-16 of the specifications (R. 29-30). Plaintiff claimed 84¢ per cubic yard for this grading work instead of the 24¢ per cubic yard allowed under the contract (R. 30). The contracting officer held that grading of the taxiway was within the requirements of the contract and that the contract unit price provided just compensation for

the work performed (R. 32). Accordingly, he denied the request for additional compensation (R. 32).

The contracting officer's conclusions were based upon the following recitals of fact which appeared in his opinion (R. 31-32): At the time the drawings for the contract were being prepared, it was known by all concerned that a taxiway was to be constructed and, although the exact location had not been determined, that it would be located near the boundaries of the air depot and the adjoining assembly plant (R. 31). The specifications for grading the assembly plant site provided for the grading of taxiways, and prospective bidders were informed of the approximate location of the taxiway area by a designation on the drawings of the "Taxiway Proposed" which later proved to be its actual location (R. 31). The drawings furnished with the invitation for bids showed the Taxiway Proposed with the red pencil notation "Taxiway Grading Included in Grading Plant Site" (R. 31). Although the drawings furnished with the formal contract did not bear the red pencil markings, the contracting officer found that the specifications and drawings clearly showed that the work under the contract included the taxiway in question (R. 32).

Plaintiff appealed to the Secretary of War from the denial of this claim and another claim (not involved here) based on work it was required to perform with respect to the grading of an indus-

trial road within the air depot area (R. 32-33). These claims were referred to the War Department Board of Contract Appeals which upheld the contracting officer's decision relating to the taxiway but reversed with respect to the industrial road (R. 33, 34). Without relying upon the red pencil markings on the drawings (to which the contracting officer had referred), the Board's opinion, adverting to the fact that both the specifications and the drawings used the word "taxiways" or "Taxiway (proposed)," stated "there is no escape from the conclusion that the grading contemplated by the contract includes grading of the taxiway" and "there is no question about the fact that the contract was signed with these provisions and this plan as a part thereof" (R. 33-34).¹

Without suggesting that the decisions of the contracting officer and the Board (the Secretary of War's designee) were in bad faith or grossly erroneous, the Court of Claims reached its own conclusion that they "cannot be sustained under the facts and the specifications and drawings" (R. 37). The Court of Claims refused to give effect to paragraph 2-16 of the specifications, providing that the Secretary of War's decision with respect to the work required by the contract was final and conclusive, on the ground that this para-

¹ The Board of Contract Appeals' decision (BCA No. 167, January 21, 1944) is reported at 2 Contract Cases Federal (Commerce Clearing House) 178.

graph must be read in connection with Article 15 which was limited to questions of fact (R. 39-40). The decision of the Board of Contract Appeals acting for the Secretary of War was held to be based upon an interpretation of the contract documents and not a question of fact within the meaning of Article 15, and accordingly not binding in any way on the contractor or the court (R. 41).

The court's judgment allowed the plaintiff 59.3¢ per cubic yard for the work performed in grading the taxiway and awarded a judgment in the amount of \$105,502.17 as the sum owing in addition to the 24¢ per cubic yard previously paid (R. 41-42).

REASONS FOR GRANTING THE WRIT

1. The dispute arose in the instant case because the contractor considered work demanded of him to be outside the requirements of the contract. Paragraph 2-16 of the specifications, which are expressly incorporated in the contract by Article I (R. 1-2), provides that "If the contractor considers any work demanded of him to be outside the requirements of the contract" he shall protest to the contracting officer. If not satisfied with the decision of the contracting officer, the contractor may appeal to the Secretary of War "whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract." *Supra*, p. 3. In making its own determination of the work required by the contract plans and specifications, the Court of Claims has substituted

its judgment for that of the Secretary of War to whom the final decision of this precise question had been specifically committed by the unambiguous provisions of the specifications.

In failing to give effect to these contract provisions, the decision presents a square conflict with the applicable decisions of this Court. *United States v. McShain, Inc.*, 308 U. S. 512, 520; *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 393; *Plumley v. United States*, 226 U. S. 545, 547; *Martinsburg & Potomac R. R. Co. v. March*, 114 U. S. 549, 553-554; *Kihlberg v. United States*, 97 U. S. 398, 402. The holding represents another in a series of recent decisions requiring corrective action by this Court in which the Court of Claims has refused to apply the established provisions of government construction contracts for the administrative settlement of designated disputes. *United States v. Callahan-Walker Constr. Co.*, 317 U. S. 56; *United States v. Blair*, 321 U. S. 730; *United States v. Beuttas*, 324 U. S. 768; *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234. This Court's decisions have long settled that such provisions are proper, and that determinations made by the designated administrative officials are conclusive on the parties, except for bad faith or errors so gross as to lead to that implication.

The instant case is virtually on all fours with *United States v. McShain, Inc.*, *supra*, in which the Court of Claims refused to give finality, as required by the specifications, to the contracting officer's in-

terpretation of the material called for by the specifications on the ground that the parties could only stipulate to the finality of determinations of fact. This Court reversed the decision of the Court of Claims *per curiam* and without opinion. The considerations which prompted the Court's decision in the *McShain* case would seem more forcibly applicable here in view of the elimination by that decision of any possible doubt of the applicable rule.²

2. There is no valid basis for removing the present case from the rule of these controlling decisions. There is not a suggestion, much less a finding, that the decision of the contracting officer, affirmed by the Board of Contract Appeals, was the result of bad faith or gross error. Likewise, there is no doubt that the decision overruled by the court below dealt with a subject specifically committed by the contract for final and conclusive administrative decision. And the reasons assigned by the Court of Claims for refusing to give final and conclusive effect to this decision are wholly without merit.

The court reasoned that since Article 15 of the contract limited disputes subject to final administrative settlement to questions of fact, paragraph 2-16 of the specifications must be read with the same limitation. When read in this light, the court

² Article 15 ("Disputes") in the *McShain* case was not limited to questions of fact. This is not a significant difference since our reliance here, as in *McShain*, is not on Article 15 but on the pertinent paragraph in the specifications quoted above, which is not limited to questions of fact.

cluded, it does not extend to the determination of non-factual disputes with respect to the work required by the contract. But the specific language in paragraph 2-16 cannot reasonably be interpreted in this fashion because it is apparent that all disputes relating to the scope of work required by the contract must involve questions of interpretation of the contract documents, similar to those involved in the present case. To read the clause in this manner, therefore, is to read it out of the contract. Clearly, this is not a valid basis for rejecting the administrative decision unless, perhaps, the clause itself be deemed invalid.

The court below was of the view, however, that the clause construed to extend to the dispute in issue, paragraph 2-16 would be invalid because it would be inconsistent with Article 15, and the contracting officials have no authority to depart from the terms of the standard form contracts. Neither of these points can stand analysis. There is no inconsistency with Article 15 because Article 15 explicitly contemplates other contract provisions relating to disputes by its opening clause which reads "except otherwise specifically provided in this contract." The specifications containing the provision involved here, which the court below recognized "has itself come to be a standard provision" (R. 39), are specifically made a part of the contract by Article 1 (R. 1-2). Moreover, even if an inconsistency be assumed, this would seem authorized by the specific

contract provision that "in case of conflict between the standard articles of the contract and the plans and specifications, the plans shall govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract." *Supra*, pp. 2-3.

If further authority for paragraph 2-16 is deemed necessary, it can be found in the unrestricted authority conferred upon the War Department (the contracting agency here) during World War II with respect to the form of contract to be used. See Title II of the First War Powers Act (Act of December 18, 1941, c. 593, 55 Stat. 838, 839, 50 U. S. C. App. 611) and Executive Order No. 9001 (3 C. F. R., 1941 Supp., pp. 330-332, December 27, 1941). The statute authorized the President to permit the war agencies "to enter into contracts * * * without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts," and the Executive Order delegated this power to the War Department, expressly authorizing "agreements of all kinds." Thousands upon thousands of war contracts were made which varied or departed from the standard form.³ It follows that the lower court's views as to the limits of a contracting officer's authority to use the standard government

³ The Claims, Protests and Appeals section (*supra*, p. 3) was widely used by the War Department throughout the war. See Anderson, *The Disputes Article in Government Contracts*, (1945) 44 Mich. L. Rev. 211, 214.

contract forms are certainly irrelevant and incorrect as to all wartime agreements entered into by the many agencies endowed with power under Title II of the First War Powers Act. Moreover, even if the contracting officials exceeded their authority in incorporating provisions in a contract, the matter is one for internal governmental correction and confers no rights upon private contractors. See *Perkins v. Lukens Steel Co.*, 310 U. S. 113; *American Smelting & Refining Co. v. United States*, 259 U. S. 75; *United States v. New York & Porto Rico S. S. Co.*, 239 U. S. 88. There was, therefore, no reason having any semblance of validity for refusing to apply the contract's unequivocal and unambiguous direction that the Secretary of War's finding was to be final and conclusive.⁴

⁴ An extended discussion of the scope of Article 15, the authority of the War Department's contracting officials to depart from standard form contracts, and the lack of standing of private contractors to complain, in any event, appears in the Government's petition for certiorari in *United States v. Pfotzer*, No. 332, this Term, denied December 6, 1948, 335 U. S. 885.

The *Pfotzer* case presented a similar issue—the finality of administrative determination of a question of interpretation of plans and specifications—but, as the brief in opposition consistently stressed, the dispute did not involve any question as to what work was required under the contract, but solely a controversy over the unit of payment for work admittedly called for by the contract and performed by the contractor (see Brief in Opp., No. 332, this Term, pp. 8-9, 9-10, 12, 14, 17, 18). The respondent, in *Pfotzer*, admitted that finality must be accorded to the administrative decision where the matter in dispute is whether certain work is required by the specifications and drawings, and that a refusal by the Court of Claims to follow that fundamental principle would warrant review here, but it argued that no such case was presented by

3. The Government is not seeking review merely to correct an erroneous decision of the court below. The instant case represents the continuation of a tendency in the Court of Claims to whittle away the authority of designated officers of the United States to make final decisions which have specifically been committed to their determination by explicit contract provisions. Notwithstanding the *McShain* decision and the subsequent decisions of this Court as late as *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234, the Court of Claims has continued to substitute its judgment for that of officials designated by contract. In addition to the instant case, see e.g., *McGraw and Company v. The United States*, Court of Claims No. 47291, decided February 7, 1949; *Pfotzer v. The United States*, 111 C. Cls. 184, 224-228, decided May 3, 1948, certiorari denied, 335 U. S. 885.⁵ These recent decisions of the court below have again weakened and narrowed the effectiveness of the well-established policy of the Government to settle, without expensive litigation, disputes arising under its contracts. They add further doubt and confusion to the authority of designated officers of the United States to make final

that petition. The instant case, there can be no doubt, does squarely present the very issue said to be absent in the earlier case: i.e., a refusal by the Court of Claims, in the teeth of an explicit contract provision, to follow an administrative determination that certain work was required by the plans and specifications.

⁵ The instant case was decided largely on the authority of the *Pfotzer* decision (R. 39, 41). See footnote 4, *supra*, p. 13.

decisions under government contracts. We submit that the power of the Government to make effective contracts of this character should not be so circumscribed except by decision of this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1949.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 97

THE UNITED STATES, PETITIONER

v.

**JEFF W. MOORMAN AND JAMES C. MOORMAN, CO-
PARTNERS, DOING BUSINESS AS J. W. MOORMAN &
SON**

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 36-42) is reported at 82 F. Supp. 1010.

JURISDICTION

The judgment of the Court of Claims was entered on March 7, 1949 (R. 42). The petition for a writ of certiorari was filed on June 3, 1949. The petition was granted on October 10, 1949 (R. 42). The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the Court of Claims may, in the absence of any finding or suggestion of bad faith or gross error, substitute its own judgment with respect to work required to be performed under a government construction contract for that of the head of the contracting agency, despite a specific contractual agreement, consented to by the complaining contractor, that the administrative decision on this issue "shall be final and binding upon the parties to the contract."

CONTRACT PROVISIONS INVOLVED

Article 15 of the contract provides:

Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraph 2-03 (e) of the specifications provides:

Conflicts.—

(1) In case of conflict between the plans and specifications, the specifications shall govern over the plans.

(2) In case of conflict between the standard articles of the contract and the plans and specifications, the plans shall govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract.

(3) In case of conflict between the general provisions, and special provisions of the specifications, the special provisions shall govern.

Paragraph 2-16 of the specifications provides:

Claims, Protests and Appeals.

(a) If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified, and within the time

limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive.

(b) All appeals from decisions of the contracting officer authorized under the contract shall be addressed to the Secretary of War, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor in the contract.

STATEMENT

Respondent partnership entered into a contract with the United States for the grading of the site of the Oklahoma City Aircraft Assembly Plant (R. 24). During the performance of the contract a dispute arose with respect to whether the grading of a taxiway to an adjacent air depot was called for by the contract (R. 24-25). The contractor performed the work at the contracting officer's direction, but sought additional compensation on the ground that it was not covered by the contract (R. 29-30). After unsuccessfully invoking the machinery which the contract prescribed for the final settlement of disputes, the contractor sued for additional compensation in the Court of Claims and recovered a judgment in the amount of \$105,502.17 (R. 31, 33, 42). The facts found by the Court of Claims are as follows:

Invitations for bids for the grading contract were sent to prospective bidders, including plaintiffs, on March 26, 1942 (R. 25). Plaintiffs' bid of 24¢ per cubic yard for an estimated quantity of one million cubic yards was accepted (R. 28). A "letter contract" was accepted by plaintiff on April 7, and about June 1, 1942, a formal contract effective as of April 3, 1942, was executed (R. 28).

In all respects pertinent here the formal contract followed the form of United States Standard Form 23 Revised, which contained the standard Article 15 provision for the administrative determination of all disputes concerning questions of fact (R. 28). *Supra*, p. 2. Paragraph 2-16 of the specifications added by the War Department contained the usual provision with reference to "Claims, Protests and Appeals" making final and binding upon the contracting parties the decision of the Secretary of War or his duly authorized representative upon protests with respect to the work required by the contract (R. 28-29, 10). *Supra*, pp. 3-4.

Upon being required to perform the grading of the taxiway in question, plaintiffs claimed this work was not called for by the contract and submitted their protest under Article 15 of the contract and paragraph 2-16 of the specifications (R. 29-30). Plaintiffs claimed 84¢ per cubic yard for this grading work instead of the 24¢ per cubic yard allowed under the contract (R. 30). The

contracting officer held that grading of the taxiway was within the requirements of the contract and that the contract unit price provided just compensation for the work performed (R. 32). Accordingly, he denied the request for additional compensation (R. 32).

The contracting officer's conclusions were based upon the following recitals of fact which appeared in his opinion (R. 31-32, cf. R. 18-22): At the time the drawings for the contract were being prepared, it was known by all concerned that a taxiway was to be constructed and, although the exact location had not been determined, that it would be located near the boundaries of the air depot and the adjoining assembly plant (R. 31). The specifications for grading the assembly plant site provided for the grading of taxiways, and prospective bidders were informed of the approximate location of the taxiway area by a designation on the drawings of the "Taxiway Proposed" which later proved to be its actual location (R. 31). The drawings furnished with the invitation for bids showed the Taxiway Proposed with the red pencil notation "Taxiway Grading Included in Grading Plant Site" (R. 31). Although the drawings furnished with the formal contract did not bear the red pencil markings, the contracting officer found that the specifications and drawings clearly showed that the work under the contract included the taxiway in question (R. 32).

Plaintiffs appealed to the Secretary of War from the denial of this claim and another claim (not involved here) based on work they were required to perform with respect to the grading of an industrial road within the air depot area (R. 32-33). In accordance with the usual War Department practice, these claims were referred to the War Department Board of Contract Appeals which upheld the contracting officer's decision relating to the taxiway but reversed with respect to the industrial road (R. 33, 34). Without relying upon the red pencil markings on the drawings (to which the contracting officer had referred), the Board's opinion, advertent to the fact that both the specifications and the drawings used the word "taxiways" or "Taxiway (proposed)," stated "there is no escape from the conclusion that the grading contemplated by the contract includes grading of the taxiway" and "there is no question about the fact that the contract was signed with these provisions and this plan as a part thereof" (R. 33-34).¹

Without suggesting that the decisions of the contracting officer and the Board (the Secretary of War's designee) were in bad faith or grossly erroneous, the Court of Claims reached its own conclusion that they "cannot be sustained under the facts and the specifications and drawings"

¹ The Board of Contract Appeals' decision (BCA No. 167, January 21, 1944) is reported at 2 *Contract Cases Federal* (Commerce Clearing House) 178.

(R. 37). The Court of Claims refused to give effect to paragraph 2-16 of the specifications, providing that the Secretary of War's decision with respect to the work required by the contract was final and conclusive, on the ground that this paragraph must be read in connection with Article 15 which was limited to questions of fact (R. 39-40). The decision of the Board of Contract Appeals (acting for the Secretary of War) was held to be based upon an interpretation of the contract documents and not a question of fact within the meaning of Article 15; and accordingly not binding in any way on the contractor or the court (R. 41).² The court's judgment allowed

² The court found, on the evidence before it, that, as a matter of fact, the drawings actually furnished to respondents with the bid invitation did not contain any red pencil markings indicating that the air depot taxiway was included (R. 25). As a matter of law, it interpreted the word "taxiways" in the pertinent specifications (R. 11, 13, 26) as referring to certain other areas which were to be graded for hard surfacing, although these areas were not designated in the drawings as "taxiways", only the area here in controversy being so marked, and although all the other items listed in the specifications for grading were designated by name on the drawings (R. 26-7, 32, 38-9).

The opinion states that petitioner conceded on argument in the Court of Claims that respondents "never received the drawing marked in red to indicate that the taxiway and connecting areas * * * were to be included in the contract," (R. 37), and this was stressed by respondents in opposing the petition for certiorari (Br. in Opp. 5, 6). We respectfully submit, however, that the only "concession" was that the Government was not prepared to prove *de novo* in the court below respondents' actual receipt of the drawing in question.

the plaintiffs 59.3¢ per cubic yard for the work performed in grading the taxiway and awarded a judgment in the amount of \$105,602.17, as the sum owing in addition to the 24¢ per cubic yard previously paid (R. 41-42).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to give finality to the administrative determination with respect to the work requirements of the contract.
2. In holding that paragraph 2-16 of the specifications did not extend to disputes relating to the work required by the contract.
3. In holding that, if construed to extend to an interpretation of the work required by the contract, paragraph 2-16 of the specifications would be inconsistent with Article 15 of the contract, and therefore unauthorized and invalid.
4. In holding that respondents, who agreed to the incorporation into the contract of paragraph 2-16 of the specifications and made use of its provisions, may attack its validity or the War Department's authority to agree to its use.
5. In entering judgment for respondents in the sum of \$105,502.17.

SUMMARY OF ARGUMENT

In refusing to accord finality to the decision of the administrative agent designated by the contract, the Court of Claims disregarded the spe-

cific terms of the contract and the consistent decisions of this Court, which have long upheld the general validity of contract provisions making the contracting officer, or some other official, the final arbiter of the meaning of the plans and specifications, or of the work to be performed under the contract. The clause providing for the conclusive administrative settlement of disputes as to the work required under the contract precisely covered the dispute in question, and can only be read as giving binding effect to the administrative decision. There was no claim or finding of bad faith or gross error implying bad faith in the War Department's determination that the grading of the disputed taxiway was within the requirements of the contract. In these circumstances, the court below was without authority, under the controlling principles, to disregard this finding and to make a *de novo* determination of its own.

There is no merit in the suggestion of the Court of Claims that the provision of the specifications committing disputes of this character to administrative determination is unenforceable and invalid as inconsistent with Article 15 ("Disputes") of the standard form of government construction contract. In the first place, the language of Article 15, which is itself limited to disputes of fact, explicitly permits exceptions. Secondly, a dispute with respect to the work requirements of a contract may very

well be deemed a question of fact, or such a mixed question of law and fact as to be fairly within the scope of Article 15; at the least, the close affinity between the issues determinable under Article 15 and those involving the meaning of plans and specifications makes it impossible to say that a clause expressly dealing with the latter is an improper deviation from, or inconsistent with, the standard disputes article. Moreover, clauses of the type involved here have long been used in conjunction with the standard article, and have never been considered inappropriate or in conflict. The last and completely dispositive answer to the argument of invalidity because of deviation from the standard form is the specific authority conferred upon the War Department by Title II of the First War Powers Act and Executive Order No. 9001 to draft contracts free of all standard form restrictions; under this authority the war agencies departed at will from the prescribed forms throughout the war period.

Finally, respondents are in no position in any event, to assert that they are not bound by the provisions of a contract to which they gave their assent, because of an alleged inconsistency between the specifications and the prescribed standard form contract. Any inhibition which may have been imposed upon the contracting agency's authority to include the disputed provision in the specifications is merely a part of

the internal management of the Government's procurement functions and confers no justiciable rights upon private contractors.

ARGUMENT

I

IN THE ABSENCE OF BAD FAITH OR ERRORS SO GROSS AS TO COMPEL AN INFERENCE OF BAD FAITH ON THE PART OF THE ADMINISTRATIVE OFFICERS, THEIR DECISION OF A QUESTION CONCERNING THE WORK REQUIRED BY THE CONTRACT, SPECIFICALLY COMMITTED TO THEM BY THE CONTRACT, IS FINAL.

The dispute arose in the instant case because the contractor considered work demanded of him to be outside the requirements of the contract. Paragraph 2-16 of the specifications, which are expressly incorporated in the contract by Article I (R. 1-2, 7), provides that "If the contractor considers any work demanded of him to be outside the requirements of the contract" he shall protest to the contracting officer. If not satisfied with the decision of the contracting officer, the contractor may appeal to the Secretary of War "whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract." *Supra*, p. 3. In making its own determination of the work required by the contract plans and specifications, the Court of Claims has substituted its judgment for that of the Secretary of War to whom the final decision of this precise question had

been specifically committed by the unambiguous provisions of the contract.

The lower court's failure to give effect to the contract provisions conflicts squarely with the applicable decisions of this Court. There would appear to be no need to labor the point that, in the language of a protesting letter from respondents to the Government's contract manager (R. 17), respondents' contention has been that their "contract, plans and specifications did not cover the grading called for." And the contract terms, providing for final administrative determination of exactly such questions, "are clear and precise, leaving no room for doubt as to the intention of the contracting parties. They seem to be susceptible of no other interpretation than that the action of the [administrative officials] * * * was intended to be conclusive." *Kihlberg v. United States*, 97 U. S. 398, 401. The obvious purpose of such provisions is to avoid the expense and delay of litigation. Cf. *United States v. Holpuch Co.*, 328 U. S. 234, 239-240; *Martinsburg & Potomac R. R. Co. v. March*, 114 U. S. 549, 553. Equally obviously, this purpose is defeated if parties who agree to the contract terms can have them nullified because they are dissatisfied with a decision by which they have contracted to be bound. Accordingly, this Court, uniformly holding provisions of the type in question valid and enforceable, has ruled repeatedly

that determinations under such provisions "in the absence of fraud or of mistake so gross as to necessarily imply bad faith, * * * will not be subjected to the revisory power of the courts." *United States v. Gleason*, 175 U. S. 588, 602; *United States v. McShain, Inc.*, 308 U. S. 512, 520; *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 388, 393; *Plumley v. United States*, 226 U. S. 545, 547; *Martinsburg & Potomac R. Co. v. March*, 114 U. S. 549, 553-554; *Kihlberg v. United States*, 97 U. S. 398, 402; *United States v. Callahan-Walker Constr. Co.*, 317 U. S. 56; *United States v. Blair*, 321 U. S. 730; *United States v. Beuttas*, 324 U. S. 768; *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234.

These cases, together with a large number of lower federal and state court decisions (see *infra*, p. 18, fn. 5), have long settled the general propriety of contract provisions placing the resolution of disputes of the character involved here in specified officers or parties. In particular, the instant case is virtually on all fours with *United States v. McShain, Inc.*, *supra*, in which the Court of Claims refused to give finality, as required by the specifications,³ to the contracting officer's interpretation of the material called for by the specifications on the ground that the par-

³ The specifications contained a clause stating: "The decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final."

ties could only stipulate to the finality of determinations of fact. This Court reversed the decision of the Court of Claims *per curiam* and without opinion. The considerations which prompted the Court's decision, in 1939, in the *McShain* case would seem more forcibly controlling here in view of the elimination by that decision of any possible doubt of the applicable rule.* But nevertheless the Court of Claims continued to render a series of decisions requiring corrective action by this Court, of which the present holding is the latest, in which it refused, without adequate basis, to apply the established provisions of government construction contracts for the administrative settlement of designated disputes. *United States v. Callahan-Walker Constr. Co.*; *United States v. Blair*; *United States v. Beuttas*; *United States v. Joseph A. Holpuch Co., supra*.

Such administrative determinations are not, of course, binding on the parties or the courts if made in bad faith. But nowhere in their petition to the court below did respondents allege that the administrative ruling they attacked was the product of fraud or bad faith (R. 1-4). Nor is

* Article 15 ("Disputes") in the *McShain* case was not limited to questions of fact. This is not a significant difference since our reliance here, as in *McShain*, is not on Article 15 but on the pertinent paragraph in the specifications quoted above (*supra*, pp. 3-4, 12, 14, fn. 3), which is not limited to questions of "fact".

there any intimation in the opinion below or elsewhere in the record that such is the basis for the decision under review.

In support of its refusal to give finality to the administrative decision, the lower court reasoned that Paragraph 2-16 of the specifications (*supra*, pp. 3-4) was merely "a procedural provision" implementing Article 15, which provided for administrative resolution of disputed questions of fact (R. 39). Read in this way, the court concluded, Paragraph 2-16 did not authorize "interpretation of the contract documents which is not a question of fact within the meaning of Article 15" (R. 41). But to read the paragraph in this way is to deprive it of any conceivable meaning the parties to the contract could have intended by it. Leaving for later discussion (*infra*, pp. 21-25) the argument that the disputed question may very well be considered one of fact, it seems clear beyond possibility of doubt that it is necessary to "interpret" the contract documents in order to determine whether a given item of work is "outside the requirements of the contract." It is clear, therefore, that the contract's unambiguous language provides for such interpretation by the contracting officer in the first instance and by the Secretary of War (or his "duly authorized representative"—here, the Board of Contract Appeals) as final arbiter. Unless the provision involved is one to which the parties could not

validly agree, the conclusiveness with which this Court's decisions endow it cannot be escaped by reading it out of the contract.

II

THERE IS NO BASIS FOR INVALIDATING THE CONTRACT PROVISION COMMITTING DISPUTES CONCERNING WORK REQUIRED BY THE CONTRACT TO FINAL ADMINISTRATIVE DECISION

The court below held, in effect, that if construed to extend to the dispute in issue, paragraph 2-16 of the specifications would be inconsistent with Article 15 and therefore invalid, because the contracting officials have no authority to depart from the terms of the standard form contracts. This is made clear by the court's reliance (R. 39, 41) upon its decision in *Pfotzer v. United States*, 111 C. Cls. 184, certiorari denied, 335 U. S. 885, where the theory of invalidity because of inconsistency with the limitation of Article 15 to disputed questions of fact is more fully developed.

Neither general law, nor Government regulations, nor the terms of Standard Form No. 23, however, barred the use of these provisions, during time of peace or war. Moreover, the War Department had clear-cut authority to deviate from the provisions of the standard form contracts during the war period.

A. GOVERNMENT PROCUREMENT REGULATIONS REQUIRING THE USE OF STANDARD CONTRACT FORMS HAVE NOT PROHIBITED THE INCLUSION OF A DISPUTES CLAUSE OF THIS CHARACTER

Courts throughout the country—this Court, the Court of Claims, and other tribunals—have long

upheld, as properly includible in construction contracts, clauses expressly giving the power of final interpretation of plans and specifications to designated officials.* As the multitude of cases shows, such provisions have had wide usage for many years, both in Government and in private agreements.* The lower court neither suggests any change in the settled judicial law on the point of ultimate power to contract for this type of clause, nor that any statute now requires a different decision, but it held in the *Pfotzer* case, and repeats here (R. 39-40), that, at least since the establishment of centralized procurement in 1933, authority has been withdrawn by the Treasury's Procurement Division from government contracting agents to insert these provisions in government construction contracts.⁷ The court points

* *E. g.*, *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 388, 393; *United States v. John McShain, Inc.*, 308 U. S. 512, 520; *McBride Electric Co. v. United States*, 51 C. Cls. 448, 455-6; *B-W Construction Co. v. United States*, 101 C. Cls. 748, 768 (reversed on other points *sub nom. United States v. Beuttas*, 324 U. S. 768); *Langevin v. United States*, 100 C. Cls. 15, 40-41; *McCloskey & Co. v. United States*, 103 C. Cls. 254; *Union Paving Co. v. United States*, 107 C. Cls. 405, 417; *United States v. Madsen Const. Co.*, 139 F. 2d 613, 614, 616 (C. A. 6); *English Const. Co., Inc. v. United States*, 43 F. Supp. 313 (D. Del.); *Tobin Quarries, Inc. v. Central Nebraska Public Power & Irr. Dist.*, 64 F. Supp. 200, 208-210 (D. Neb.), affirmed, 157 F. 2d 482 (C. A. 8); and state and federal decisions there cited.

* See cases cited and referred to in fn. 5, *supra*, and also *infra*, pp. 25-30.

⁷ By Section 1 of Executive Order No. 6166, June 10, 1933 (note following 5 U. S. C. 132), the Procurement Division

to the "Disputes" clause of the standard form (Article 15), which deals with "questions of fact,"* and founds the invalidation of the disputes provision upon the "Directions for Preparation of Contract," attached to Form No. 23, which state: "There shall be no deviation from

of the Treasury Department (later called the Bureau of Federal Supply, 11 Fed. Reg. 13638) was authorized to supervise procurement throughout the Federal Government, and to require use of approved contract forms. 41 C. F. R. 1.1-1.2, 11.1-11.3. U. S. Standard Form No. 23 ("Construction") was promulgated under this authority, and was to be used "for every formal contract for the construction or repair of public buildings or works." 41 C. F. R. 12.23, p. 1332.

By section 102 (a) of the Federal Property and Administrative Services Act of 1949 (Pub. L. No. 152, 81st Cong., 1st Sess.), approved June 30, 1949, the functions of the Bureau of Federal Supply, and its Director, were transferred to the Administrator of General Services, and the Bureau and the office of Director of the Bureau were abolished. In addition, the Federal Property and Administrative Services Act provides that the Administrator of General Services "is authorized * * * (4) to prescribe standardized forms and procedures, except such as the Comptroller General is authorized by law to prescribe, and standard purchase specifications." Section 206 (a).

* Article 15 ("Disputes") of U. S. Standard Form No. 23, which is limited to questions of fact, was involved in *United States v. Callahan-Walker Constr. Co.*, 317 U. S. 56-58. Article 15 ("Disputes") of U. S. Government Form P. W. A. 51, which form was extensively utilized on government construction contracts between 1933 and 1940, is not so limited and provides for administrative settlement of "all" disputes concerning questions arising under the contract. This was the form considered by this Court in *United States v. John McShain, Inc.*, 308 U. S. 512, 520; *United States v. Blair*, 321 U. S. 730; *United States v. Beuttas*, 324 U. S. 768, and *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234.

this standard contract form, except as provided for in these directions, and except as authorized by the Director of Procurement" and "Additional contract provisions and instructions, deemed necessary for the particular work, not inconsistent with the standard form nor involving questions of policy, may be incorporated in the specifications or other accompanying papers" (111 C. Cls. at 226-7).

1. The short answer to this suggestion of improper deviation is that none exists, and that neither courts, Government agencies, nor contractors in general have hitherto perceived any inconsistency. Article 15 is limited to disputes concerning issues of "fact," and does not imply that other disputes cannot be handled similarly, if the parties so agree. The opening phrase ("Except as otherwise specifically provided in this contract") itself indicates room for additional provisions regarding contractual disputes to be incorporated in the agreement. The inclusion of a provision extending administrative settlement to issues of interpretation of the drawings and specifications cannot, therefore, be a deviation from, or inconsistent with, Article 15, which stands unchanged and fully effective. To the contrary, the close affinity, in construction matters, between the expertise and judgment required to determine strictly "factual" issues and that needed to solve problems of the interpreta-

tion of plans and specifications has led some Government contracting agencies to insist that Article 15 itself covers the latter, without need for a supplementary clause like paragraph 2-16 (*supra*, pp. 3-4), or a provision making the contracting officer the final interpreter of the plans and specifications, such as the *Pfotzer* contract contained. Cf. *United States v. Callahan-Walker Constr. Co.*, 317 U. S. 56 ("equitable adjustment" required by change order a "question of fact").*

2. There is more than respectable justification for this view that the interpretation of plans and specifications is a "factual" question for determination by the designated arbiter. Although the interpretation of writings has generally been considered a function of the court, the historical basis for this appears to have been the expertness of the judge in this field, rather than the fact that a question of "law", and not of "fact", was involved. See Williston, *Contracts* (Rev. ed. 1936), sec. 616; Thayer, *A Preliminary*

* The Court of Claims has, however, ruled consistently, in recent years, that interpretation of plans and specifications does not come under Article 15 of Standard Form No. 23. *Davis v. United States*, 82 C. Cls. 334, 346-347; *Callahan Construction Co. v. United States*, 91 C. Cls. 538, 616-617; *Schmoll v. United States*, 91 C. Cls. 1, 33; *John McShain, Inc. v. United States*, 88 C. Cls. 284, 296-297 (reversed, 308 U. S. 512, 520); *B-W Construction Co. v. United States*, 97 C. Cls. 92, 118; *Gerhardt F. Meyne Co. v. United States*, 110 C. Cls. 527; *Orino v. United States*, 111 C. Cls. 491; instant opinion, R. 41.

Treatise on Evidence (1898), pp. 202-207; Green, *Judge and Jury* (1930), pp. 268-279. For the ascertainment of the objective meaning of the contractual actions of the particular parties to a particular transaction, as well as of their actual intention—both of which may be involved in the interpretation of a contract document—can properly be characterized as “factual”. The matter about which the parties reached agreement in the instant case, for example, “must be discovered * * * by evidence of the facts and circumstances concerning the making of the contract.” Williston, *ibid.* Cf. Thayer, *op. cit., supra, ibid.*; Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, (1944) 57 Harv. L. Rev. 753, 831, fn. 354. Indeed, the “factual” character of the present inquiry is demonstrated by the fact that the Court of Claims based its disagreement with the War Department’s determination wholly on its own appraisal of the evidence rather than upon any legal principles of interpretation of instruments (R. 25, 26-7, 37-39; see fn. 2, *supra*, p. 8).

If the historical factor of the greater expertness to make the determination be considered controlling in the distribution of the function of deciding such disputes—instead of routine distinctions between “fact” and “law”—it would seem that the interpretation of plans and specifications should be left to the administrative procedure provided by the contract. This would accord with

this Court's decisions in which deference has been given to the technical competence of administrative experts. *E. g.*, *Gray v. Powell*, 314 U. S. 402; *Dobson v. Commissioner*, 320 U. S. 489; *Labor Board v. Hearst Publications*, 322 U. S. 111; *Cardillo v. Liberty Mutual Co.*, 330 U. S. 469; cf. Isaacs, *The Law and the Facts* (1922) 22 Col. L. Rev. 1; Brown, *Fact and Law in Judicial Review*, (1943) 56 Har. L. Rev. 899; Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, (1944) 58 Harv. L. Rev. 70. Here, the administrative determination that the plans and specifications embraced the grading of the taxiway in question was made by experienced, specialized personnel. The contracting officer, the Acting Area Engineer, was an army officer in the Corps of Engineers. The War Department Board of Contract Appeals, to which the appeal from the contracting officer's decision was taken, comprised lawyers, accountants, engineer officers, and others of long experience, who devoted their full time to the hearing of appeals. Over a period of years, the handling of hundreds of cases enabled the Board of Contract Appeals to develop a high degree of expertness in passing upon disputes arising under construction, and other Army procurement, contracts. Familiarity thus obtained with the terminology used in the drafting of specifications and plans, and with the trade customs and usages, permitted

uniformity and sureness in interpretation. Pursuant to the Memorandum of the Secretary of War, which created it, and its own regulations, the Board employed procedures like those of other administrative tribunals—hearing evidence and oral argument from both sides, reading the briefs of the parties, maintaining records of its proceedings, and rendering its decisions in writing. 10 C. F. R. Cum. Supp. 1943: 81.318e.¹⁰

In these circumstances, whether or not issues turning on the meaning of plans and specifications, such as questions of the work to be performed under the contract, be deemed technically under Article 15, it seems clear that a contract clause expressly assigning the decision of such

¹⁰ The War Department Board of Contract Appeals was created pursuant to a Memorandum of the Secretary of War, dated August 8, 1942. See 10 C. F. R. Cum. Supp. 1943, 81.318d. The Board originally consisted of three members, "one of whom [was] designated as President of the Board. There [was] also a recorder. The President of the Board and the recorder [were] required to be persons trained in the law. * * * Appointments [were] made by the Secretary of War." *Ibid.* Later, other members were added. The Board's decisions have been reported in *Contract Cases Federal* (Commerce Clearing House). On the Board, see Fain and Watt, *War Procurement—A New Pattern in Contracts*, (1944) 44 Col. L. Rev. 127, 193-4; Anderson, *The Disputes Article in Government Contracts*, (1945) 44 Mich. L. Rev. 211, 229-231.

The War Department Board and a similar Navy Board, created in 1944, were consolidated for cases arising after May 1, 1949, into an Armed Services Board of Contract Appeals, set up in a charter promulgated by the Secretaries of the Army, Navy, and Air Force.

issues to administrative officers is not a "deviation" from, or in conflict with, the terms of that Article.

3. Nor, at the time this contract was made, did the challenged clause of the specifications involve a new "question of policy," upon which the specific ruling of the Procurement Division was necessary (*supra*, p. 20). By 1942, the policy had long been established. Provisions of the same general character as paragraph 2-16—making the contracting officer the interpreter of plans and specifications—have been widely used in numerous government construction contracts for at least thirty-five years, and are now regarded as "common."¹¹ The widespread use of such clauses is proved most simply by a survey of the Government contract cases in this Court and the lower courts.¹² This conclusion is confirmed by an ex-

¹¹ Anderson, *The Disputes Article in Government Contracts* (1945), 44 Mich. L. Rev. 211, 215, 238-239; *B-W Constr. Co. v. United States*, 101 C. Cls. 748, 768 ("It is true that it is not uncommon in construction contracts for the parties to agree that the decision of the architect or engineer shall be final on such questions as the proper interpretation of the plans and specifications * * *").

¹² The cases in this Court in which it clearly appears that the contract contained such a provision are: *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 388, 393 (1916); *United States v. John McShain, Inc.*, 308 U. S. 512, 520 (1939); *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234, 237 (1946). Recent cases in the lower federal courts are: *Fred R. Comb Co. v. United States*, 100 C. Cls. 259, 260; *King v. United States*, 100 C. Cls. 475, 482; *Fleisher Eng. & Constr. Co. v. United States*, 98 C. Cls. 139, 141; *Langevin v.*

amination of the Government's construction-contract records back to 1920, which reveal that they have been used by various government bureaus doing construction work, and consistently by the main such agency, Public Buildings Administration and its predecessors.¹³ Specifically, similar

United States, 100 C. Cls. 15, 26; *McCloskey & Co. v. United States*, 103 C. Cls. 254; *Union Paving Co. v. United States*, 107 C. Cls. 405, 413, 417, 422; *United States v. Madsen Constr. Co.*, 139 F. 2d 613, 614 (C. A. 6); *English Constr. Co. v. United States*, 43 F. Supp. 313 (D. Del.).

¹³ The old Office of the Supervising Architect included in its "General Conditions" a provision that "The decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final," or, later (*e. g.*, 1932), that "The decision of the Contracting Officer or his duly authorized representative as to the proper interpretation of the drawings and specifications shall be final." By Executive Order No. 6166, June 10, 1933 (*supra*, pp. 18-19, fn. 7), the Office of the Supervising Architect was transferred to the newly created Procurement Division of the Treasury Department. The same clause was used by the Public Buildings Branch of the Procurement Division (successor to the Office of the Supervising Architect). By Reorganization Plan No. 1, effective July 1, 1939, 53 Stat. 1423 (note following 5 U. S. C. 133t), the Public Buildings Branch was transferred to the Federal Works Agency, and became known as Public Buildings Administration. That Administration has at all times retained the clause in the "General Conditions" to its construction contracts, and employs it currently. (By Section 103 of the Federal Property and Administrative Services Act of 1949 (Pub. L. No. 152, 81st Cong., 1st sess.), approved June 30, 1949, the Public Buildings Administration was abolished and its functions transferred to the Administrator of General Services).

In addition, the cases cited above (fn. 12), indicate that a similar clause has been used by many other government

provisions were widely used in general construction specifications, both before the initial adoption of Standard Form No. 23 in 1926 and thereafter, including the fifteen-year period since the Procurement Division was granted authority to require the use of standard forms (see fn. 7, *supra*, pp. 18-19). The Procurement Division and the Bureau of Federal Supply have been cognizant of, and have always regarded, the inclusion of such clauses together with Standard Form No. 23 as wholly unexceptionable. This is shown most vividly by the fact that the Procurement Division's own Public Buildings Branch made use of the combination from 1933 to 1939, and that since its transfer in that year, the Public Buildings Administration, the chief government construction agency, has uniformly employed a "proper interpretation" clause in the General Conditions of its specifications.¹⁴

agencies, including the War Department, the Bureau of Indian Affairs, the Department of the Interior, Public Works Administration, and the Civil Aeronautics Administration.

¹⁴ Even if such clauses be regarded as technical deviations from, or inconsistent with, Article 15, the established practice of fifteen years indicates tacit authorization by the Director of Procurement (as he then was). (See *supra*, pp. 19-20, 25-27.) Paragraph 2-03 (e) of the specifications of respondents' contract expressly provides that "in case of conflict between the standard articles of the contract and the plans and specifications, the plans shall govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract." *Supra*, p. 3.

Paragraph 2-16 of the present contract (*supra*, pp. 3-4) is simply a more specific version of the usual type of general "interpretation" provision, necessarily involving no more and no less than the interpretation of plans and specifications in the specified field of the work required by the contract. And, as the court below points out (R. 39) the equivalent of paragraph 2-16 "has * * * come to be a standard provision." At least as early as 1936, the Army's Engineer Department was including a similar paragraph in its contracts.¹⁵ Here, too, such long-established administrative practice negates the view that the disputed provision is a deviation from, or inconsistent with, the standard form, or involves an unsettled matter of policy. Cf. *Inland Waterways Corp. v. Young*, 309 U. S. 517, 525; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315; *United States v. Midwest Oil*

¹⁵ In its Standard Form of Specifications for Dredging, as revised to May 1936, the Engineer Department included the following:

1-13. *Claims and protests.*—If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately, and then file a written protest with the contracting officer against the same within 10 days thereafter, or be considered as having accepted the record or ruling. (See arts. 3 and 15 [procedure for initial resolution and final administrative appeals on disputed questions of fact] of contract.)

See also fn. 19, *infra*, p. 32.

Co., 236 U. S. 459, 473. It wholly justifies the declaration by the Court of Claims in 1940 that an identical provision was "valid and enforceable" (*Silas Mason Company, Inc. v. United States*, 90 C. Cls. 266, 269-70, 276), and destroys any possible basis for a contrary position today.

4. Not only is the instant decision in conflict with the settled practice, and unsupported by the terms of Standard Form No. 23, but it constitutes a complete about face from recent decisions of the Court of Claims on all fours with this one. In *Langevin v. United States*, 100 C. Cls. 15, 25-26, 40-41 (1943), the standard form was used, with the normal Article 15, and the specifications contained a clause making the contracting officer the interpreter of the drawings and specifications; the court below did not hesitate to recognize and apply the latter provision. *McCloskey & Co. v. United States*, 103 C. Cls. 254, 255-256, 264-265 (1945), involving a similar coupling of disputes provisions, expressly rested on the "proper interpretation" clause in holding that the plaintiff could not recover for certain back counters in a government cafeteria which it claimed were not called for by the plans and specifications, but which the contracting officer required to be built. In *Union Paving Co. v. United States*, 107 C. Cls. 405, 408-409, 417 (1946), with similar contract and specifications,

the court relied on the broad interpretation provision in the specifications in holding that the contractor could not recover for having to use more concrete than it believed was called for by the specifications. And *Silas Mason Company, Inc. v. United States*, *supra*, saw no defect in a specifications clause identical (on this point) with paragraph 2-16 of respondent's contract. Not only the novelty but the error of the instant opinion, and of the earlier *Pfotzer* decision are underscored by these prior holdings of the Court of Claims itself.

B. IN ANY EVENT, EXPRESS AUTHORITY EXISTED FOR DEVIATING FROM THE STANDARD FORMS DURING THE WAR

In any event, during World War II, the War Department (the contracting agency here) was freed by Title II of the First War Powers Act (Act of December 18, 1941, c. 593, 55 Stat. 838, 839, 50 U. S. C. App. 611) and by Executive Order No. 9001 (3 C. F. R., 1941 Supp., pp. 330-332, December 27, 1941) from the requirement of using the Procurement Division's standard forms. The statute authorized the President to permit the war agencies "to enter into contracts and into amendments or modifications of contracts * * * without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts * * *," and the Executive Order delegated this power to the War Department, expressly authorizing "agreements of all kinds." As the Attorney

General said in a classic opinion on the Act and Order (40 Op. Atty. Gen. 225, dated August 29, 1942, at pp. 228, 230-231) "the grant is without any limitation whatever" (save certain specific exemptions not now relevant), and surely permitted the disregard of legislation and executive directions concerning the distribution of procurement functions within the Government.¹⁶ During the active life of Title II of the First War Powers Act, the War Department did not consider itself bound to use the peacetime standard forms, and as a matter of practice frequently departed from the terms of the Procurement Division's contracts, or instituted new forms, without seeking or securing any authorization from the peace-time contract-promulgating agency.¹⁷ Thousands upon thousands of war contracts were made which did not comply with the Treasury's regulations. The Procurement Divi-

¹⁶ The Attorney General's opinion specifically mentioned (pp. 228, 231) as among the statutes which could be superseded, the Act of February 27, 1929, 45 Stat. 1341, 41 U. S. C. 7a-7d, centralizing government purchasing in the Treasury Department. This is one of the two main acts under which the Procurement Division (later the Bureau of Federal Supply) operated. See Note following 41 U. S. C. 7. The other statute is the Act of June 17, 1910, 36 Stat. 531, 41 U. S. C. 7.

¹⁷ The War Department issued an entire series of its own standard form contracts. See *e. g.*, War Department Procurement Regulations, pars. 304, 1301-1325, 10 C. F. R. Cum. Supp. 81.304, 81.1301-81.1325. Cf. Fain and Watt, *War Procurement—A New Pattern in Contracts*, (1944) 44 Col. L. Rev. 127.

sion accepted the Attorney General's and the war agencies' views as to the scope of the First War Powers Act, and the Comptroller General did not object to the use of nonstandard forms.¹⁸ It follows that the lower court's views as to the limits of a contracting officer's authority to use the Procurement Division's standard forms are wholly irrelevant and incorrect as to all wartime agreements entered into by the many agencies endowed with power under Title II of the First War Powers Act.¹⁹

III

EVEN IF THE DISPUTED PROVISION WERE UNAUTHORIZED,
RESPONDENTS WOULD LACK STANDING TO CHALLENGE
IT

Even if the contracting officer were without authority under the requirements of Standard Form 23, or government procurement regulations, to include the disputed provision in the specifications, the contractor would have no standing to challenge that clause. Before bidding upon the

¹⁸ A memorandum recently submitted by the Bureau of Federal Supply to a Senate Committee states that after enactment of the First War Powers Act "the Military Establishment enjoyed for war purposes a complete exemption from all authority of the Bureau of Federal Supply with respect to procurement." Hearings before the Senate Committee on Expenditures in the Executive Departments, 80th Cong., 2d sess., on the proposed Federal Property Act of 1948, p. 129.

¹⁹ The "Claims, Protests and Appeals" provision (paragraph 2-16 of the specifications, *supra*, pp. 3-4) was used by the War Department during at least a substantial part of the war period. See Anderson, *The Disputes Article in Government Contracts* (1945) 41 Mich. L. Rev. 211, 214.

project, respondents were furnished with copies of the specifications containing paragraph 2-16 ("Claims, Protests and Appeals") (R. 2-3, 10). The "Letter Contract" accepted by them on April 7, 1942 expressly incorporated the specifications (R. 1, 5). The formal contract, later executed by both parties, likewise made the pertinent specifications "a part" of the contract (R. 7). The very provision now attacked as invalid was thus made known to respondents at the earliest possible time, and was voluntarily accepted and agreed to by them, without any protest so far as we are aware. In addition, when disputes arose, respondents made full use of the review mechanism of paragraph 2-16 (*supra*, pp. 3-4) to procure appellate decisions by the War Department's Board of Contract Appeals.²⁰

"The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Twin City Co. v. Harding Glass Co.*, 283 U. S. 353, 356. There is nothing in the nature of Government contracts which alters this general rule and grants to a contractor freely agreeing to, and making use of, a contract term the privilege of later repudiating it when it works to his disadvantage. Cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113,

²⁰ On one question (not involved here) involving interpretation of the plans and specifications, the Board of Contract Appeals upheld respondents rather than the contracting officer. See 2 *Contract Cases Federal* (Commerce Clearing House) 902. *Supra*, p. 7.

127, 129-130; *United States v. Standard Rice Co.*, 323 U. S. 106, 111; *Priebe & Sons, Inc. v. United States*, 332 U. S. 407, 411.

The Court of Claims, however, relying on its decision in *Pfotzer v. United States*, 111 C. Cls. 184, *supra*, p. 17 (R. 39, 41), apparently finds a reason for granting respondents a unique status in the asserted absence of authority to "deviate" from the terms of the standard form construction contract issued by the Treasury's Procurement Division.² But established doctrine flatly denies that a contractor receives any private right from such a failure of the contracting officer to stay within the bounds of his contractual power. "Like private individuals and businesses, the Government enjoys the unrestricted power * * * to fix the terms and conditions upon which it will make needed purchases"; and "the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone." *Perkins v. Lukens Steel Co.*, 310 U. S. at 127 (italics supplied). The standardization of government contract forms, and the centralization of federal procurement policy in the Treasury Department in 1933, was not undertaken to confer private rights on government contractors, but to promote the uniformity and efficiency of government contracting, as the terms of the author-

²See fn. 7, *supra*, pp. 18-19, for the Procurement Division's authority to prescribe standard form contracts.

izing Reorganization Act make clear.²² If the Procurement Division's direction of uniformity was violated in this instance, the matter is one of internal housekeeping, appropriate for correction by superior executive or administrative authorities. The provisions of the contract, freely entered into by respondent, are not thereby rendered unenforceable against the private contractor.²³ In this respect, the Procurement

²² Executive Order No. 6166 (centralizing procurement functions) was issued under Title IV ("Reorganization of Executive Departments") of the Legislative Appropriation Act for the fiscal year 1933 (Act of June 30, 1932, c. 314, 47 Stat. 382, 413-415), as amended by Section 16 of the Treasury and Post-Office Department Appropriation Act of March 3, 1933 (c. 212, 47 Stat. 1489, 1517-1519), and Title III of the Act of March 20, 1933, c. 3, 48 Stat. 8, 16. These statutes empowered the President to reorganize executive agencies and functions in order "to reduce expenditures * * *," "to increase the efficiency of the operations of the Government * * *," "to reduce the number of [executive] agencies," "to eliminate overlapping and duplication of effort," and to "group, coordinate, and consolidate executive and administrative agencies of the Government * * * according to major purposes." 47 Stat. 1517. See also Bureau of the Budget Circular No. 47 (November 22, 1921), reprinted in *Harwood-Nebel Construction Co., Inc. v. United States*, 105 C. Cls. 116, 129-130.

²³ The question discussed here concerns only the supposed deviation from the requirements of Standard Form 23 by the contracting officer in inserting paragraph 2-16 of the specifications into the contract. As we have shown (*supra*, pp. 13-15, 17-18), there is no doubt that the inclusion of such a provision could lawfully be authorized by the proper agency of the Government, and the clause in nowise infringes on the judicial power.

Division's requirements are in precisely the same class of Government-oriented internal regulations as the Public Contracts Act (*Perkins v. Lukens Steel Co.*, 310 U. S. at 127-9), the statute directing Government contracts to be in writing (*United States v. New York and Porto Rico Steamship Co.*, 239 U. S. 88, 92), and the advertising-and-low-bidder legislation (*American Smelting & Refining Co. v. United States*, 259 U. S. 75, 78; *Perkins v. Lukens Steel Co.*, 310 U. S. at 126)—all of which have been held by this Court not to confer any justiciable rights on contractors or would-be contractors.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below is erroneous and should be reversed.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,
MORTON LIFTIN,
BENJAMIN FORMAN,
MARVIN E. FRANKEL,
DAVID B. BLISS,

'Attorneys.

NOVEMBER 1949.

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CLERK

**IN THE SUPREME COURT OF THE
UNITED STATES**

No. [REDACTED] 97

THE UNITED STATES,
Petitioner,

VERSUS.

**JEFF W. MOORMAN and JAMES C. MOORMAN, copartners,
doing business as J. W. MOORMAN & SON,**

Respondents.

**REPLY BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI
TO THE COURT OF CLAIMS.**

**F. A. BODOVITZ,
Tulsa, Oklahoma,
*Attorney for Respondents.***

**Of Counsel:
V. J. BODOVITZ,
Oklahoma City, Oklahoma.
JULY, 1949.**

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**IN THE SUPREME COURT OF THE
UNITED STATES**

No. 837

THE UNITED STATES,

Petitioner,

VERSUS

**EFF W. MOORMAN and JAMES C. MOORMAN, copartners,
doing business as J. W. MOORMAN & SON,**

Respondents.

**REPLY BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI
TO THE COURT OF CLAIMS.**

Respondents through their attorneys oppose the
issuance of *Certiorari* to review the judgment of the Court
of Claims entered in the above entitled matter on March 7,
1949.

QUESTION PRESENTED

On page 2 of the Brief of Petitioner is set forth their
statement as to question presented. As written, it is a
beautiful hypothetical question, which, in all probability,

the Solicitor General desires answered, but it is not the question presented by this case. The question presented in this case is:

Does an apparently inconsistent clause (Par. 2-16) (R. 10) in the specifications which is attached to the U. S. Standard Form Contract No. 23 Rev. change the meaning of a regular clause (Article 15), (R. 9) in the Contract as regards disputes concerning questions of fact, and if so, under the circumstances of this case, does it justify or permit a ruling by the engineer on a matter of law as to whether there was actually a contract concerning the extra work required to be done off the site as set forth in the contract and specifications, and not merely a question of fact as to the work to be done thereunder?

STATEMENT

The statement as set forth in the Petition at page 4 is not complete nor entirely accurate. It is not merely a question or dispute that arose regarding the grading of a taxiway being called for by the Contract, but more accurately whether there was ever any contract for the grading of a taxiway which was outside the area or boundary of the site on which the project and work were to be done, as set forth in the Contract and specifications. This will be more clearly set forth in our statement hereinafter set forth.

RESPONDENTS' STATEMENT OF FACTS

On April 4, 1942, Petitioner and Respondents entered into a contract by Letter of Intent (R. 5), by which the Respondents were to move "approximately one million cubic yards of grading (excavation) at the site of the Okla-

homa City Aircraft Assembly Plant, Oklahoma City, Oklahoma, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof or which will be furnished to you prior to April 8, 1942."

Formal Contract (R. 7) was entered into, dated April 3, 1942, the front page of which stated:

"Contract for grading plant site. Place: Oklahoma City Aircraft Assembly Plant," and the body of the Contract provided that the contractor shall furnish the materials and "perform the work for grading the site of the Oklahoma City Aircraft Assembly Plant, and to be in strict accordance with specifications for grading of plant site, Oklahoma City Aircraft Assembly Plant, and the drawings referred to in paragraph 1-15 of the specifications."

The specifications which accompanied the signed contract contained this clause:

"1-02 Location: The plant site to be graded in accordance with the plans in these specifications is located in the Southeast Quarter (SE $\frac{1}{4}$) of Section Fourteen (14), and the East Half (E $\frac{1}{2}$) of Section Twenty-Three (23), Township Eleven North (11 N), Range Two West (2 W) of the 1M, approximately seven miles southeast of the business district of Oklahoma City, Oklahoma" (R. 11).

The drawings referred to in paragraph 1-15 of the specifications were two blue prints, one known as Location Map G 2, and the other as Plat Plan G 3. The Plat Plan showed Range 29 to be the west boundary limit of the Oklahoma City Aircraft Assembly Plant and was designated in the blue print with the words "property line". Similarly, north of Station 80 is a line likewise designated as "north property line" on the blue print.

On June 17th and 18th, 1942 (R. 14 and 29), the Petitioner through their engineering department directed the Respondents to grade area No. 6. This area 6 was west of Range 29 and extended north beyond Station 80, and *all of this grading as so ordered was outside of the site of the Oklahoma City Aircraft Assembly Plant and was on the site of another Government project, to wit: Oklahoma City Air Depot or Tinker Field* (R. 30).

Respondents protested this order for a grading outside of the site but did the work as required. At the same time the Petitioner required an industrial road to be constructed north of Station 80, which was likewise outside of the area or site of the Oklahoma City Aircraft Assembly Plant. This likewise was performed. Claims were presented for work done on these two items; on the theory that there was no contract. Both claims were disallowed by the engineer and appeal taken to the Secretary of War (R. 31 & 32). The Secretary of War allowed payment for the industrial road (R. 37), but disallowed payment for the grading of the taxiway (R. 33 & 34). Suit was filed, and the Court of Claims allowed Respondents judgment as set forth in the Petition (R. 24-42).

The controversy arose, as developed in the hearings in the Court of Claims, but which was never divulged in the taxiway case before the Secretary of War, for the reason that the Government did not disclose the map which is hereinafter discussed. The interpretation and rulings of the engineer arose because of the following facts: At the time

contractors were invited to bid, the Government handed to prospective bidders a blue print with certain red pencil corrections and notations thereon (R. 31). *The Petitioner concedes that the Respondents did not receive the same copy of blue print that was given to the other prospective bidders (R. 37 & 38). In other words, the Respondents were never given or shown a red marked blue print until the written order to grade area 6 was issued (R. 33).*

This red marked blue print had certain corrections or notations on it in red pencil marks which changed in a very important manner three things:

(1) There was a notation which disclosed the property line as being approximately Range 36 and not Range 29, and this westward extension was marked "western limits of grading plant site" (R. 31). This new area was off the site of the Oklahoma City Aircraft Assembly Plant; and was on the site of another government project.

(2) In addition there was added a notation "taxiway grading included in grading plant site" (R. 19).

(3) Extending north and both north and west of the plant site were these additional words: "Include in grading plant site."

Respondents never received this red marked blue print (R. 37). Furthermore, this red penciled blue print was not carried forward into the completed Contract (R. 32). On the contrary, the blue prints that accompanied the Contract had no notations on them, and there is nothing to indicate any grading or excavation west of Range 29 and north of

Station 80; but on the contrary, on the designated "taxiway" which is west of Range 29 (and off the site) is shown the word in parenthesis "proposed" (R. 19 & 27). *It is conceded that at the time the Petitioner ordered the work (taxiway) done west of Range 29, which was outside of the site of the Oklahoma City Aircraft Assembly Plant; as well as at the time the claim was disallowed by the engineer, they had before them the red marked blue print (basing their ruling on it) and erroneously assumed that the Respondents likewise had been furnished a copy (R. 32 & 36). Also the opinion of the Secretary of War disallowing the taxiway claim made no mention whatsoever of the blue print Plat Plan G 3, marked in red (R. 33). But the Secretary of War in allowing payment for the industrial road referred to the red marked blue print, and based his opinion on it (R. 34).*

All of the above facts are borne out by the findings made by the Court of Claims.

Petitioner is guilty of certain inaccuracies in his statement. On page 6, he states, "It was known by all concerned that a taxiway was to be constructed." There is no basis for this statement. And even assuming he was correct, there is no reason to assume that it was to be built off of the site.

On page 6, he asserts that "the contracting officer found the specifications and drawings clearly showed that the work under the Contract included the taxiway in question." But, that ruling was based on the erroneous as-

sumption that Respondents had been furnished a copy of the red marked blue print (R. 31).

On page 7, he refers to the industrial road as being within the air depot area. It was not (R. 31).

On the same page it is said: "The Court of Claims refused to give effect to paragraph 2-16 of the specifications." We submit that court did give correct legal effect to it (R. 39-40).

On page 8 of the Petition, the Court of Claims is accused of substituting its own judgment for that of the Secretary of War "to whom the final decision of this precise question had been specifically committed by the unambiguous provisions of the specifications." We submit this statement is not proven nor correct:

(a) It assumes that standard clause No. 15 of the Contract is to be ignored, and

(b) That paragraph 2-16 of the specifications is to control.

(c) The Secretary of War "ignored" it as regards the industrial road (R. 34).

(d) The Court of Claims made a similar ruling in the *Pfotzer case*, and this Court refused *Certiorari* in December, 1948, when this identical question was raised and presented (Petition page 13 n).

ARGUMENT

We submit that there is no reason or necessity for *Certiorari*.

EQUITIES

All of the equities are in favor of the Respondents. The work was performed and the Petitioner obtained the benefit thereof and should pay for same. And the Court of Claims so found. Also, the Secretary of War, on appeal, allowed the claim for the industrial road, which claim is identical with that of the taxiway.

NO QUESTION OF IMPORTANCE

This case certainly presents no question of gravity or importance justifying the issuance of a Writ of *Certiorari*. And the Petition and brief present no special and important reasons therefor.

CONTRACTS CONSTRUED AGAINST PARTY

Even under the hypothetical question presented by the Petition in the Question Presented, which we state is not the one herein involved, a unique position is taken by the Petitioner. In the first instance, the Contract and specifications were drawn by the Government, and in the event of ambiguity the Contract should be interpreted most favorably against the party who drew the Contract and created the doubts, inconsistencies, and ambiguities.

Hollenbach v. U. S.

233 U. S. 172, 158 L. ed 901, 34 S. Ct. 553;

U. S. v. Spearin,
248 U. S. 132, 63 L. ed. 166, 39 S. Ct. 59;
Reading Steel Casting v. U. S.,
268 U. S. 186, 188, 45 S. Ct. 469, 69 L.
ed. 907.

**ARTICLE 15 OF CONTRACT CONTROLS AND ONLY
QUESTIONS OF FACT COULD BE DETERMINED
BY THE ENGINEER.**

In the presentation of the matter, counsel for the Petitioner, we submit, entirely begs the question. His statement of the question involved assumes a state of facts which are not proven.

The Contract as originally presented contained Article 15 (R. 9) and likewise contained paragraph 2-16 of the specifications (R. 10). That latter paragraph provided for appeals to the Chief of Engineers, United States Army and also contained this statement: "(See Article 15 of the Contract.)" As actually furnished, the Contract again contained Section 15 and contained paragraph 2-16 of the specifications, which provided for appeal to the Secretary of War, instead of to the Chief of Engineers, and left out the parenthetical reference to Article 15 of the Contract (R. 40).

The Contract further provided that the only changes could be made under Article 22 (R. 40) of the Contract, and it is inconceivable that the specifications could have the effect of modifying or changing the Contract provisions themselves. Had that been the intention, either the Contract would have been rewritten or Article 15 would have been deleted.

Furthermore, Article 15 is in the Contract and paragraph 2-16 is in the specifications.

Petitioner's position is that paragraph 2-16 of the specifications controls even though the Contract still had in it Clause No. 15.

Let us analyze for the moment the meaning of specifications.

(a) Webster's *Twentieth Century Dictionary*, Unabridged, defines "specifications" as follows:

"A particular and detailed account or description of a thing; specifically, a statement of particulars, describing the dimensions, details, or peculiarities of any work about to be undertaken, as in architecture, building, or engineering."

(b) The courts have held as follows:

"The term 'specifications' as used in a building contract ordinarily means a detailed and particular account of the structure to be built, including the manner of its construction and the materials to be used."

Woolacott v. Meekin,

151 Cal. 701, 91 Pac. 612, 615.

" 'Specifications' not only embraces the dimension and mode of construction, but includes a description of every piece of material, its kind, length, breadth and thickness, and manner of joining the separate parts together."

Superior Incinerator v. Tompkins (Tex.)
37 S. W. (2d), 391, 395.

(c) Let us examine our own exhibits, and we find as follows: Specifications. Special Provisions: 1-14 (R. 12)

"Work covered by Contract Price—The Contractor shall, for the contract price, furnish and pay for all materials, labor and all permanent, temporary, prepar

atory, and incidental work, furnish all accessories, and do everything which may be necessary to carry out the contract in good faith, which contemplates the completion of everything in good working order completed in accordance with the plans and these specifications."

General Provisions: 2-02 (15) (R. 13):

"Specifications—The written description of the materials, instructions for the installation of the materials and other information pertaining to the execution of the contract which are a part of the contract documents. The specifications may be altered by supplementary specifications or addenda which will become a part of the contract when issued."

2-03 (a) (R. 13):

"General—It is the intent of the plans and specifications to describe a completed work to be performed under this contract. Considerable latitude is allowed in these specifications in order that there may be no unfair discrimination against the builders of different styles and types of equipment. For this reason, no omission of any detail from the specifications shall release the Contractor from furnishing any materials or equipment, usual or proper, nor from doing anything necessary for proper and complete construction, unless specifically set forth in the Contractor's proposal."

It is very clear that it was never intended that the specifications were to be or mean anything other than as commonly and normally understood. That is, specifications were not intended to be a substitute for the Contract, but they were to perform their natural and normal function, to-wit: advise the contractor as regards the type, manner, and mode of work. It is not, as stated in Petition, necessary to read paragraph 2-16 out of the Contract. In their true position and function, they remain in—complementary and explanatory—as found by the Court of Claims (R. 39):

"Paragraph 2-16 is entitled 'Claims, Protests and Appeals' and is primarily a procedural provision intended to provide an orderly method for carrying out the provisions and purposes of Article 15 of the standard formal contract. Such a paragraph in 'General Provisions' of the specifications has itself come to be standard provision, and, as we pointed out in the *Pfotzer case, supra*, the fact that the specifications, which are intended to delineate the work to be done and the procedures to be followed, are made a part of the contract by Article 1, does not warrant the conclusion that they override an express provision of the contract. Provisions such as paragraph 2-16 must, if possible, be read and interpreted in the light of and consistent with the provisions of the formal contract. When this is done, there is no conflict between Article 15 and paragraph 2-16."

On page 11 of the Petition, the beginning phrase of Article 15 is taken out of its context, and made to appear to be contrary to its clear meaning. This is misleading. It reads "except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer * * *" (R. 2). That phrase limits and modifies and refers only to disputes as to questions of fact, and clearly nothing else.

Article 15 of the Contract remained in the Contract, and there is no indication that it was to be relieved of its place or importance. On the contrary, paragraph 2-16 of the specifications merely provided to whom the appeal should be made and, properly interpreted, means that such decision shall be final and binding to the extent provided in Article 15 of the Contract. As stated above, had the

Government (which drew the contract) intended that Article 15 be changed, they could have done so by express words, or deleted it, as was done with certain other articles of the Contract.

Thus only questions of fact were to be determined by the engineer, and the interpretation of the Contract or the determination as to whether there was a contract as to the taxiway was a question of law, and not within the authority of the engineer.

Let us assume (though not admitting) that paragraph 2-16 of the specifications is to be given the effect that the Solicitor seeks. Carried out, then, to its logical conclusion, it means:

(a) That the Chief of Engineers may interpret contracts both as to law and fact, and make rulings of law. This we have always assumed is the province of the courts.

(b) Furthermore, it places the Government in the anomalous position of writing its own contracts, placing ambiguous and doubtful clauses therein, and then permitting an engineer to make legal determinations as to the limitations, meanings, and extent of its own contracts. As stated in *U. S. v. Lundstrom*, 139 Fed. (2d) 792, C. C. A. 9 (1943), this was hardly the intent of the Government:

"The contract contains the following provision (similar to Clause No. 15), 'It is the position of the Government that this provision covers the dispute over the description of the materials to be hauled, that it was the duty of the Lundstrom to follow the procedure therein, and that the district court was without jurisdiction of the subject matter.' But if this were

true, the very untenable and paradoxical situation would be present that the Government, one of the parties to the contract, would have the decision as to the meaning and extent of its contract. Provisions such as here under consideration do not relate at all to the interpretation of the Contract. Issues so arising are strictly issues of law for the courts to determine."

Furthermore, still assuming paragraph 2-16 means as the Solicitor argues, we have a situation in which the engineer makes a decision as to Respondents' liability under the Contract, on the erroneous assumption that they had been furnished a copy of the red marked blue print—which decision based on the red marked blue print—required Respondents to do the grading for the taxiway outside the site of the Assembly Plant and denied extra compensation therefor. This engineer made the same ruling, using the same reasoning, in ordering the work and denying the claim for the industrial road. On appeal, the Secretary of War overruled the engineer and allowed the claim for the industrial road—but affirmed the engineer and denied the claim for the taxiway—but in his opinion on the taxiway did not refer to, nor pay attention to the red marked blue print. Although, as to the industrial road, the red marked blue print was the basis of the allowance of the claim to Respondents. These opinions cannot be reconciled. The decision of the engineer and the Secretary of War on the taxiway is arbitrary and so grossly erroneous as to imply bad faith. And the Court of Claims so held by its result.

The cases cited on page 9 of the Petition are not in point as to this issue.

Statement is made to the effect that *U. S. v. McShain*, 308 U.S. 512, 520 is virtually on all fours with the instant case. We submit that on examination and analysis, this claim is clearly not accurate nor correct. Here we deal with a clause in the Contract (Article 15), which refers to questions of fact only—and paragraph 2-16 of the specifications, which apparently sets forth to whom the appeal shall go—and of more importance, the contention of Respondents that there was no contract at all as regards work to be done off the site, which clearly isn't an engineer's construction or interpretation of work to be done thereunder. In the *McShain* case, no such issue was involved. There, it was a conflict between the plans and specifications requiring an interpretation. No question as regards the contract. The Court of Claims (88 Court Cl. 284, 296, 297) said:

"During the course of existing differences over the backfill item, the construction engineer in order to forestall an apparent delay in finishing the work requested the plaintiff in writing to proceed with the same and at the same time said 'your observance of this request to proceed with the work' will be the subject of an adjustment of the costs later on. Using a backfill of gravel increased the plaintiff's cost of doing the work by the sum of \$1,877.93.

"Specification 66 refers to Drawing E-404 and this drawing points out where the subsurface drains are to be installed, and does not provide for a backfill of gravel as to the tile drain to be installed underneath the center of the concrete slab.

"It is admitted that a difference existed between the specifications and the work called for under the plans and this difference was as to the character of backfill over the drains. Drawing E-404 expressly discloses an

entire absence of any requirement to backfill the drainage area under the center of the concrete slab with gravel, and the determination of this question involved not a determination of facts but an interpretation of the contract, drawing, and specifications.

"The contracting officer, in order to reach a conclusion, did of necessity predicate the same by construing the specifications and drawing to exact a backfill of gravel for the drain under the concrete slab by implication. It could not have been done otherwise, for it is clear that no express language imposed this duty upon the contractor * * *.

"The plaintiff performed this extra work under protest. As a matter of fact, a proposal for performing it and the added cost involved were furnished to and considered by the defendant, and, notwithstanding the fact that subsequent to its rejection the plaintiff proceeded under the contract to obtain an extra allowance, we now think that under the decision of this court in the *Davis case, supra*, the plaintiff is entitled to a judgment for \$1,877.93 for performing this extra work. The amount the plaintiff seeks is not challenged by the defendant and it will be included in the final award."

With no opinion, this Court reversed as to this item.

THIS COURT HAS RECENTLY PASSED ON THIS VERY ISSUE

This Court has already passed on this question adverse to the contention of the Petitioner.

The first case is that of *Silas Mason v. U. S.*, 62 Fed. Supplement 432, 105 Ct. Cl., 90 C. C. 266, cert. den.; 67 S.Ct. 43 rehearing den.; 67 S.Ct. 181, 43,329, U. S. 825, 713, 91 L. ed. 701, 619.

A more recent and almost identical case was *U. S. v. Pfoetzer*, 77 Fed. Supplement 390, 111 Ct. Cl. 184, cert. den. Dec. 6, 1948, 335 U.S. 885.

The opinion in our case was based on the *Pfotzer case*, and so stated by the Court of Claims (R. 39). In that case the Court of Claims made the following statement:

"A few words should be said with reference to the argument of defendant that the decisions of the contracting officer and the Board of Contract Appeals, acting for the Secretary of War, were final and conclusive as to all the claims involved, under Article 15 and paragraph 1-07 of the Specifications, Section I, Part I, General Provisions, etc.

"(11) We do not agree. Article 15 of the standard contract form, entitled 'Disputes,' provided in part: Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal * * * to the head of the department * * * whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

"Under this article the finality of decision was clearly limited to questions of fact or factual issues. There was no other provision in the standard contract which 'otherwise specifically provided.' But defendant argues that paragraph 1-07, *supra*, was a provision 'in this contract' which 'otherwise specifically provided.' Paragraph 1-07 read: 1-07 Interpretation of Contract; Unless otherwise specifically set forth, the Contractor shall furnish all materials, plant, supplies, equipment, labor, etc., necessary to complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the Contracting Officer shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

"It is true that the specifications were, by Article 1, of the printed standard form of contract, made a part thereof, but the specifications and drawings were made

a part of the contract for the purpose of detailing the work to be performed and the materials to be furnished, and we think this is evidence against rather than in favor of defendant's contention. If it had been intended that a provision in a specification should override an article in the formal contract, we think such intention would have been expressed, or that the specifications would have been mentioned in Article 15. Where Article 15 mentions 'this contract,' it means the 'Standard Form 23' and not the specifications. Otherwise all the labor and study that entered into the formulation, preparation and adoption of the standard form of Government contract by the Departmental Board of Contract and Adjustment for approval by the President, would have been left to the whim of the specification writer. See *Harwood-Nebel Construction Co. v. United States*, 105 Ct.Cl. 116.

"(12) The court will take notice, from the many cases brought here, of the fact that the Standard Form of Construction Contract, Form 23, was first adopted and approved by the President in 1926, and that form contained Article 15, as it is written into the present contract, Form 23. Article 15 states a rule of policy. It is only under Article 22, that the Government, acting through the contracting agency or the head of the department, may, as a matter of policy, add additional articles as 'Alterations.' Without any other aid than the standard contract form itself, we think it is manifest that the Government intended that the provisions of the standard form, and the policies stated therein, would be paramount to the specifications and would govern in case of inconsistency or conflict. *Loftis v. United States*, Ct. Cl., 76 F. Supp. 816. But we are not compelled to rely upon this general rule of implied intention. The view is supported by the express provision of the standard printed 'Directions for Preparation of Contract' which were formulated and issued with the original standard contract forms. The present contract is 'Form 23, Revised, Approved by the Secretary of the Treasury, September 14, 1940.' On the back of the last page thereof is printed the 'Directions

for Preparation of Contract,' paragraphs 1, 2, 3, and 15, of which are as follows:

"1. This form shall be used for every formal contract for the construction or repair of public buildings or works, but its use will not be required in foreign countries.

"2. There shall be no deviation from this standard form, except as provided for in these directions, and except as authorized by the Director of Procurement. Where interlineations, deletions, additions, or other alterations are permitted, specific notation of the same shall be entered in the blank space following the article entitled 'Alterations' before signing. This article is not to be construed as general authority to deviate from the standard form.

* * * * *

"3. The blank space of article 1 is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

* * * * *

"15. Additional contract provisions and instructions, deemed necessary for the particular work, not inconsistent with the standard forms nor involving questions of policy, may be incorporated in the specifications or other accompanying papers.

"From the foregoing it is clear that the interpretation referred to in paragraph 1-07 of the specifications only related and was intended to relate, as its provisions show, to the furnishing by the contractor of materials, plants, supplies, equipment, labor, etc., necessary to complete the work in accordance with the drawings and specifications. This had to do with the performance of the work in an accurate and speedy manner and was for the purpose of putting the contractor on notice that he would be required to perform the work and diligently proceed therewith ac-

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According to the directions of the Government's contracting officer and not according to his own views about what might be necessary under the plans and specifications. The contractor might dispute the directions of the contracting officer but he had to proceed with the work and obey the contracting officer's directions concerning performance, based upon his interpretation or opinion as to 'the true intent and meaning of the drawings and specifications.' The ultimate settlement and decision of the disputes arising under the contract was another matter which was to be governed by Article 15. Under this article, as we have held, the conclusive nature of the decisions on claims was limited to disputes 'concerning questions of fact,' as distinguished from questions involving interpretations or the law of the contract, as those terms are usually and generally construed and applied by the courts. *Williston on Contracts*, Vol. 3, § 616; *Albina Marine Iron Works v. United States*, 79 Ct. Cl. 714, 722; *Callahan Construction Co. v. United States*, 91 Ct. Cl. 538, 616; *Schmoll v. United States*, 91 Ct. Cl. 1, 33; *John K. Ruff v. United States*, 96 Ct. Cl. 148, 165; *B-W Construction Co. v. United States*, 97 Ct. Cl. 92, 118; *John McShain, Inc. v. United States*, 97 Ct. Cl. 281, 295.

"Paragraph 1-07 obviously had nothing to do with claims, protests, disputes and appeals, with reference to amounts due. It did not purport to make final and conclusive the contracting officer's interpretation of the plans and specifications with reference to these matters. Its purpose was to keep the work going without interruption and to avoid disputes as far as possible."

The case herein is almost identical. The directions for preparation of Contract are absolutely identical. The questions raised were identical, and the same reason and ruling was given by the Court of Claims.

The Petitioner seeks to distinguish the cases. But his analysis is not sound. In the *Pfotzer* case, Petitioner states

the Respondents consistently stressed that the dispute did not involve any question as to what work was required under the Contract, but solely a controversy over the unit of payment for the work. Here the question is not as to what work was required under the Contract, but a consistent position that there was no contract for any work done outside of the limits and boundary of the plant site, as defined in the Contract and specifications. The same issues were raised and argued in the Court of Claims, and adverse rulings made thereon contrary to the position of the United States. This Court ruled on the very same issues as raised, and denied *Certiorari* in December, 1948. There is no new issue, and there is nothing justifying a Writ of *Certiorari*.

We submit the argument (Petition, page 14) as to this, and other decisions rendering judgments for work done, having the effect of weakening and narrowing the effectiveness of a policy of the Government to settle contract disputes without expensive litigation is again begging the question. Congress created the Court of Claims; enacted the Tucker Act; and the Contract Settlement Act of 1944.

And the statement in the note at page 14 of the Petition that by this decision the Court of Claims, in the teeth of explicit contract provisions, refused to follow an administrative determination that certain work was required by the plans and specifications, likewise begs the question. This Court did not so find in refusing *Certiorari* in the *Pfotzer* case, *supra*. Here, likewise, the Court of Claims didn't find

such explicit contract provision—nor any basis for such administrative determination.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

F. A. BODOVITZ,
Tulsa, Oklahoma,
Attorney for Respondents.

Of Counsel:

V. J. BODOVITZ,
Oklahoma City, Oklahoma.

JULY, 1949.

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**IN THE SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1949

No. 97

97

THE UNITED STATES,
Petitioner,

VERSUS

JEFF W. MOORMAN and JAMES C. MOORMAN,
Co-Partners, doing business as J. W.
MOORMAN & SON,
Respondents.

On Writ of Certiorari to the Court of Claims

BRIEF OF RESPONDENTS

F. A. BODOVITZ,
Tulsa, Oklahoma,
Attorney for Respondents.

Of Counsel:
V. J. BODOVITZ,
Oklahoma City 2, Oklahoma.
NOVEMBER, 1949.

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On Writ of Certiorari to the Court of Claims

BRIEF OF RESPONDENTS

QUESTION PRESENTED

As set forth on Page 2 of Petitioner's Brief, the question presented is, we submit, entirely incorrect. It begs the question.

The basic and fundamental question presented here is: Was respondent required under his contract with the United States, to grade the taxiway, which taxiway was not on the site as defined in the Contract, Plans and Specifications?

To answer that requires the determination of two additional questions:

1. Who shall determine respondent's liability under his contract?
 - a. As contended by respondent: The Court. For the reason Article 15 of the Contract is controlling, and limited the Engineer to the determination of questions of fact only.
 - b. As contended by petitioner: The Engineer. For the reason that Paragraph 2-16 of the Specifications controls over Article 15 of the contract, and permits the Engineer to determine both questions of law and fact.
2. Assuming, though not admitting that petitioner's view is correct, and the Engineer is to be permitted to construe the contract, in this case was not the decision as made by the Engineer so arbitrary and capricious, and so grossly erroneous as to amount to bad faith, and should it not be set aside, and the judgment of the Court of Claims affirmed?

STATEMENT

On April 4, 1942, petitioner and respondents entered into a contract by Letter of Intent (R. 5), by which the respondents were to move "approximately one million cubic yards of grading (excavation) at the site of the Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof or which will be furnished to you prior to April 8, 1942."

Formal Contract (R. 7) was entered into, dated April 3, 1942, the front page of which stated:

"Contract for grading plant site. Place: Oklahoma City Aircraft Assembly Plant," and the body of the

Contract provided that the contractor shall furnish the materials and "perform the work for *grading the site* of the Oklahoma City Aircraft Assembly Plant, and to be in strict accordance with specifications for grading of plant site, Oklahoma City Aircraft Assembly Plant, and the drawings referred to in paragraph 1-15 of the specifications."

The specifications which accompanied the signed contract contained this clause:

"1-02 Location: *The plant site* to be graded in accordance with the plans in these specifications is located in the Southeast Quarter (SE $\frac{1}{4}$) of Section Fourteen (14), and the East Half (E $\frac{1}{2}$) of Section Twenty-Three (23), Township Eleven North (11 N), Range Two West (2 W) of the 1M, approximately seven miles southeast of the business district of Oklahoma City, Oklahoma" (R. 11).

The drawings referred to in paragraph 1-15 of the specifications were two blueprints, one known as Location Map G 2, and the other as Plat Plan G 3. The Plat Plan showed Range 29 to be the west boundary limit of the Oklahoma City Aircraft Assembly Plant and was designated in the blueprint with the words "property line." Similarly, north of Station 80 is a line likewise designated as "north property line" on the blueprint.

On June 17th and 18th, 1942 (R. 14 and 29), the petitioner through their engineering department directed the respondents to grade area No. 6. This area 6 was west of Range 29 (700 feet) and extended north (1400 feet) beyond Station 80, and all of this grading as so ordered was outside of the site of the Oklahoma City Aircraft Assembly Plant and was on the site of another Govern-

ment project, to-wit: Oklahoma City or Midwest Air Depot or Tinker Field. (R. 30).

Respondents protested this order for grading outside of the site but did the work as required.

At the same time the petitioner required an Industrial Road to be constructed north of Station 80, which was likewise outside of the area or site of the Oklahoma City Aircraft Assembly Plant. This likewise was performed.

Claims were presented for work done on these two items, on the theory that there was no contract. Both claims were disallowed by the engineer and appeal taken to the Secretary of War (R. 31 and 32). The Secretary of War allowed payment for the Industrial Road (R. 37), but disallowed payment for the grading of the Taxiway (R. 33 & 34). Suit was filed, and the Court of Claims allowed respondents judgment as set forth in the Petition (R. 24-42).

The controversy arose, as developed in the hearings in the Court of Claims, but which was never divulged in the taxiway case before the Secretary of War, for the reason that the Government did not disclose the map which is hereinafter discussed. The interpretation and rulings of the engineer arose because of the following facts: At the time contractors were invited to bid, the Government handed to prospective bidders a blueprint with seven (7) red pencil corrections and notations thereon (R. 31). (This red marked blueprint. Petitioner's Exhibit No. 1, is shown as an Appendix at the back of this brief). The petitioner concedes that the respondents did not receive

the same copy of blueprint that was given to the other prospective bidders (R. 37 & 38). In other words, the respondents never received a red marked blueprint, and never saw it until the written order to grade area 6 was issued (R. 33).

This red marked blueprint had certain corrections or notations on it in red pencil marks which changed in a very important manner three things:

(1) There was a notation which disclosed the property line as being approximately Range 36 and not Range 29, and this westward (approximately 700 feet) extension was marked "west limits of grading plant site" (R. 31). This new area was off the site of the Oklahoma City Aircraft Assembly Plant; and was on the site of another government project — Midwest Air Depot.

(2) In addition there was added a notation "taxiway grading included in grading plant site" (R. 19).

(3) Extending north (approximately 1400 feet) and both north and west of the plant site were these additional words: "Include in grading plant site."

Furthermore, this red penciled blueprint was not carried forward into the completed Contract (R. 32). On the contrary, the blueprints that accompanied the Contract had no notations on them, and there is nothing to indicate any grading or excavation west of Range 29 and north of Station 80; but on the contrary, on the designated "taxiway" which is west of Range 29 (and off the site) is shown the word in parenthesis "proposed" (R. 19 & 27).

It is conceded that at the time the petitioner ordered the work (taxiway) done west of Range 29, which was outside of the site of the Oklahoma City Aircraft Assembly Plant; as well as at the time the claim was disallowed by the engineer, they had before them the red marked blueprint (basing their ruling on it) and erroneously assumed that the respondents likewise had been furnished a copy (R. 32 & 36). Also the opinion of the Secretary of War disallowing the taxiway claim made no mention whatsoever of the blueprint Plat Plan G 3, marked in red (R. 33). But the Secretary of War in allowing payment for the Industrial Road referred to the red marked blueprint, and based his opinion on it (R. 34).

All of the above facts are borne out by the findings made by the Court of Claims.

SUMMARY OF ARGUMENT

This case clearly presents a situation in which an initial error or mistake leaves in its wake resulting apologies and attempts to justify such initial error or mistake. The Engineers, after they had drafted the blueprints, changed their minds and decided to increase the work to be done, which additional work was the construction of the Taxiway here involved, and which Taxiway was off the site of the Douglas Aircraft Assembly Plant. However, errors then came into being:

First, they failed to give a copy of this red-penciled blueprint to the respondent and,

Second, either by inadvertance, or change of mind, the blueprints that became incorporated in the contract did

not show the red-penciled changes, but on the contrary, showed the work to be done within the boundaries of the site as set forth in the specifications, contract and plans, and furthermore, indicated on the Taxiway the word "proposed."

Third, the Engineers then ordered the additional work done and disallowed the claim therefor, on the erroneous assumption that respondent had been furnished such red-marked blueprint.

From that point on, much effort has been expended in an attempt to justify this error, or change of mind. The Engineer, in calling for the work and denying the claim, admittedly based his work order and denial on the assumption that the respondent had received a copy of the red-marked blueprint. The position of the petitioner in the denial of the claim and its resistance in the Board of Contract Appeals; in the Court of Claims; and in the two briefs filed herein, are put in the position of trying to avoid the consequences of the error, or change of mind, of what the petitioner, in his brief, denominates as "experienced, specialized personnel."

In the Summary of Argument, commencing on Page 9 of the brief filed herein, the position is again taken that the clause in the specifications controls over that of the contract. By so doing petitioner is guilty of trying to avoid the consequences of the Contract, prepared in its entirety by the petitioner, who is responsible for any irregularities, conflicts, or ambiguities therein.

We submit that, using the same argument advanced by the petitioner, on Page 11 of their brief, that they are in no position to assert that they are not bound by Article 15 of the Contract.

ARGUMENT

1. Article 15 of the Contract controls and only questions of fact could be determined by the Engineer.

The Contract as originally presented at the time respondent bid, contained Article 15 (R. 9) and likewise contained paragraph 2-16 of the specifications (R. 10). That latter paragraph provided for appeals to the Chief of Engineers, United States Army and also contained this statement: "(See Article 15 of the Contract.)" As actually furnished, the Contract again contained Section 15 and contained paragraph 2-16 of the specifications, which provided for appeal to the Secretary of War, instead of to the Chief of Engineers, and left out the parenthetical reference to Article 15 of the Contract (R. 40).

- a. It must be borne in mind at all times that Article 15 (R. 9) is in the Contract and not in the specifications. Apparently a similar clause is carried forward in all the government contracts.

Petitioner, on Page 10 and Page 20 of the Brief, indulges in the statement that Article 15 explicitly permits exceptions and "indicates room for additional provisions regarding disputes to be incorporated in the agreement." We submit that this analysis is wholly incorrect and is not

borne out by a reading of this article, and the application to it of ordinary use of English words. The clause at the beginning of the article modifies and controls the balance of the article and any exceptions or additional provisions necessarily relate to "disputes concerning questions of fact."

b. Paragraph 2-16 of the specifications, which petitioner argues is controlling, is in the specifications, and not in the Contract itself.

Let us analyze for the moment the meaning of specifications.

(1) Webster's *Twentieth Century Dictionary*, Unabridged, defines "specifications" as follows:

"A particular and detailed account or description of a thing; specifically, a statement of particulars, describing the dimensions, details, or peculiarities of any work about to be undertaken, as in architecture, building, or engineering."

(2) The courts have held as follows:

"The term 'specifications' as used in a building contract ordinarily means a detailed and particular account of the structure to be built, including the manner of its construction and the materials to be used."

Woolacott v. Meekin,

151 Cal. 701, 91 Pac. 612, 615.

" 'Specifications' not only embraces the dimensions and mode of construction, but includes a description of every piece of material, its kind, length, breadth and thickness, and manner of joining the separate parts together."

Superior Incinerator v. Tompkins (Tex.),
37 S.W. (2d) 391, 395.

(3) Let us examine our own exhibits, and we find as follows:

Specifications:

"1-01 General.—These special provisions are a part of the specifications for this contract and shall be consulted in detail for instructions pertaining to this work (R. 11). See also 3-01" (R. 13).

Special Provisions—1-14:

"Work covered by Contract Price—The Contractor shall, for the contract price, furnish and pay for all materials, labor and all permanent, temporary, preparatory, and incidental work, furnish all accessories, and do everything which may be necessary to carry out the contract in good faith, which contemplates the completion of everything in good working order completed in accordance with the plans and these specifications" (R. 12).

General Provisions—2-02 (15):

"Specifications—The written description of the materials, instructions for the installation of the materials and other information pertaining to the execution of the contract which are a part of the contract documents. The specifications may be altered by supplementary specifications or addenda which will become a part of the contract when issued" (R. 13).

2-03 (a):

"General—It is the intent of the plans and specifications to describe a completed work to be performed under this contract. Considerable latitude is allowed in these specifications in order that there may be no unfair discrimination against the builders of different styles and types of equipment. For this reason, no omission of any detail from the specifications shall release the Contractor from furnishing any materials or equipment, usual or proper, nor from doing anything necessary for proper and complete construction, unless specifically set forth in the Contractor's proposal" (R. 13).

The Contract itself makes a sharp distinction between the Contract and Specifications —

Article 1 (R. 7). The Contractor shall * * * perform the work for grading the site * * * in accordance with the specifications.

Article 3 (R. 8). The Contracting Officer may at any time, by a written order * * * make changes in the drawings and/or specifications of this contract within the general scope thereof.

These, we submit, show conclusively that there is a clear, sharp and distinct difference between "Contract" and "Specification."

It is very clear that it was never intended that the specifications were to be or mean anything other than as commonly and normally understood. That is, specifications were not intended to be a substitute for the Contract, but they were to perform their natural and normal function, to-wit: advise the contractor as regards the type, manner, and mode of work. It is not necessary to read paragraph 2-16 out of the Contract. In their true position and function, they remain in — complementary and explanatory — as found by the Court of Claims (R. 39):

"Paragraph 2-16 is entitled 'Claims, Protests and Appeals' and is primarily a procedural provision intended to provide an orderly method for carrying out the provisions and purposes of Article 15 of the standard formal contract. Such a paragraph in 'General Provisions' of the specifications has itself come to be standard provision, and, as we pointed out in the *Piotzer case, supra*, the fact that the specifications, which are intended to delineate the work to be done and the procedures to be followed, are made a part

of the contract by Article 1, does not warrant the conclusion that they override an express provision of the contract. Provisions such as paragraph 2-16 must, if possible, be read and interpreted in the light of and consistent with the provisions of the formal contract. When this is done, there is no conflict between Article 15 and paragraph 2-16."

c. Article 15 remained in the Contract, although certain changes were made in the Contract as disclosed by Article 22 (R. 9) of the Contract which delineated the alterations. In this Article 22 all the changes that were made in the Contract and in the Specifications were expressly noted — and Article 15 remained intact. Certainly, had the Petitioner (who is solely responsible for the Contract) intended that Article 15 be eliminated, or made subservient to Paragraph 216 of the Specifications, it would have been easy and simple to make this known by its deletion or modification, and the fact that it was not done leads but to the one conclusion — that it was intended to function as written.

The above proposition is further supported by Article 3 of the Contract (R. 8):

"If the parties fail to agree upon the adjustment to be made, *the dispute shall be determined as provided in Article 15 hereof.* But nothing provided in this Article shall excuse the Contractor from proceeding with the prosecution of the work as changed."

d. Petitioner's position assumes a conflict between the Contract and the Specifications and it would ignore Article 15 of the Contract. This conflict, contradiction, or ambiguity arises in a contract wholly prepared or drafted

by the petitioner; and by the decisions of this Court should be interpreted most favorably against the party who drew the Contract and created the doubts, inconsistencies and ambiguities.

Hollerbach v. United States,
233 U.S. 172, 58 L. ed. 901,
134 S. Ct. 553;

United States v. Spearin,
248 U.S. 132, 63 L. ed. 166, 39 S. Ct. 59;

Reading Steel Casting v. United States,
268 U.S. 186, 45 S.Ct. 469, 69 L. ed. 907.

To summarize, there are three possible results arising from the apparent conflict in these two clauses:

(1) Hold that Art. 15 is controlling, not changed by Par. 2-16 of the Specifications. This, due to the fact that (a) Art. 15 is in the Contract and Par. 2-16 is in the Specifications. (b) Art. 15 was purposely left in the Contract when ample opportunity was given to amend or delete it, as there were amendments and deletions. (c) In case of conflict, construe the Contract most strongly against the party responsible for the conflict.

(2) Hold that the two clauses remain intact, and adopt the view of the Court of Claims, that Par. 2-16 implements Art. 15, and shows merely the procedural steps.

(3) Hold that Art. 15 is to be eliminated and adopt Par. 2-16 of the Specifications as controlling. This is the position of the Petitioner. We submit it is incorrect, illogical and unsound.

(a) It fails to give any satisfactory logic or reason why Art. 15 is to be deleted and ignored.

(b) It fails to show in any manner why a clause in the specifications shall be given a function not normally given such. If it had been intended that a provision in a specification should override an Article in the formal contract, such intention would have been expressed, or the specification would have been mentioned in Art. 15.

(c) It fails to show reason or authority why an Engineer should be permitted to create doubts, inconsistencies and errors in a contract and then be the sole judge as to their intent and meaning — and in so doing, expressly interpret the contract, both as to law and fact, and make rulings of law. As stated in *U. S. v. Lundstrom* (C.C.A. 9, 1943), 139 Fed. (2d) 792, this was hardly the intent of the Government:

“The contract contains the following provision (similar to Clause No. 15), ‘It is the position of the Government that this provision covers the dispute over the description of the materials to be hauled, that it was the duty of Lundstrom to follow the procedure therein, and that the district court was without jurisdiction of the subject matter.’ But if this were true, the very untenable and paradoxical situation would be present that the Government, one of the parties to the contract, would have the decision as to the meaning and extent of its contract. Provisions such as here under consideration do not relate at all to the interpretation of the Contract. Issues so arising are strictly issues of law for the courts to determine.”

(d) It permits the Engineer to make arbitrary and capricious rulings, both of law and fact, so grossly erroneous as to be almost ridiculous, and penalize the innocent other party to the contract.

2. The determinations of the Engineer were so grossly erroneous as to necessarily imply bad faith, and are subject to the revisory power of this Court.

a. The Engineer in charge drafted the original blueprints, which conformed in its boundaries to the site as set forth in the specifications.

b. The Engineer changed his mind and increased the work to be done and changed the boundaries and evidenced this by making seven red markings and changes on the blue prints.

c. It was the intention of the Engineer to furnish a red-marked blueprint to all prospective bidders, but, through mistake, respondents were never given such a copy, and never knew of the intention of the petitioner to increase the work to be done.

d. The respondents never saw this red-marked blueprint until long after they had signed the Contract and actually when the work was ordered to be done on the Taxiway, which Taxiway was outside the site of the Oklahoma City Aircraft Assembly Plant.

e. The Contract, as signed, did not carry with it the red-marked blueprint. Respondents do not know whether this was through inadvertance, error, or complete change of mind; the blueprints, as furnished with the Contract, had the word "proposed" written after taxiway.

f. The Engineer ordered the work to be done on the Taxiway on the assumption that respondent had received a red-marked blueprint, and the Engineer admitted in his testimony that he knew there had been a mistake.

g. The Engineer ordered the Industrial Road built, which was off the site of the Aircraft Assembly Plant, on the same assumption.

h. The Engineer denied respondents' claim for additional pay for the construction of both the Industrial Road and the Taxiway, and gave the same reasons for both, to-wit: That the respondents had been furnished a red-marked blueprint.

i. The Board of Contract Appeals denied relief on the Taxiway, without referring, at any time, to the red-marked blueprint.

j. The Board of Contract Appeals subsequently allowed the claim on the Industrial Road, and expressly referred to the red-marked blueprints. There is no way these divergent rulings can be reconciled.

On Page 23 of the brief, petitioner refers to the Engineers as "experienced, specialized personnel." These rulings do not bear out such a conclusion.

In fact, the Board of Contract Appeals, in its opinion on the Industrial Road, used the following language:

"All of these circumstances above related, considered in the light of the uncertainty of the specifications and drawings, indicate to the Board that neither party intended at the time the contract was entered into that the appellant would be required to grade the 'industrial road' site, and, therefore, the requirement by the contracting officer, that the appellant grade this 'industrial road' site was extra work not originally contemplated by either party, and the appellant is entitled to be paid a reasonable sum for this work" (R. 35).

The Court of Claims made no mention as to gross errors of judgment or bad faith, as they decided it without the necessity of such findings.

We respectfully submit that this Court, with this record before it is necessarily driven to the conclusion that the Engineers were guilty of bad faith, or such gross errors of judgment as would imply bad faith; because it is inconceivable that the errors and mistakes of the Engineers in this chronological sequence of events, as above delineated, and which resulted in expense to the respondent, should be borne by the respondent. The respondent did the work and the petitioner got the benefit of it. The respondent did the work at increased costs, and should not be punished or penalized for the errors and mistakes of the Engineer, which gross mistakes should be subjected to the revisory power of this Court.

Petitioner urges the proposition that the Engineer shall be permitted conclusively to determine the meaning and boundaries of the contract. In the face of an admitted original intent to increase the area of the work, and to increase the work to be done—and to provide for this work off the site as defined in the contract, plans and specifications—and with a definite change of mind, or error, and an abandonment of this increase in area, still, petitioner would permit the Engineer to construe the Contract as to its area, extent and boundaries, and determine the extent of the liability of the contractor. If ever there was a perfect instance where the "expertness of the judge in this field" was to be applied, it is here (See Williston, Contracts, Vol. 3, Sec. 616 — Petitioner's brief, Page 21).

If Engineers' "experienced, specialized personnel" commit such gross errors and show such incompetence in their

own field (See opinion, Board of Contract Appeals, R. 37, and compare opinions in Taxiway and Industrial Road), we are sure they are not qualified in the field of acting as courts—in passing on their own ambiguous contracts, or on their own errors of omission or commission. The law of contracts as announced by the many decisions of this Court, can not and will not be remade, and the functions of the courts handed over to Engineers, as argued by petitioner.

The question here is whether the Engineer shall be permitted to determine the liability of respondents to construct the Taxiway—and that requires a legal construction of the contract.

Statement is made to the effect that *U. S. v. McShain*, 308 U.S. 512, 520 is virtually on all fours with the instant case. We submit that on examination and analysis, this claim is clearly neither accurate nor correct. Here we deal with a clause in the *Contract* (Article 15), which refers to questions of fact only—and of more importance, the contention of respondents that there was no contract at all as regards work to be done off the site, which clearly isn't an engineer's construction or interpretation of work to be done thereunder. In the *McShain* case, no such issue was involved. There, it was a conflict between the plans and specifications requiring an interpretation. No question as regards the contract. The Court of Claims (88 Court. Cl. 284, 296, 297) said:

"During the course of existing differences over the backfill item, the construction engineer in order to

forestall an apparent delay in finishing the work requested the plaintiff in writing to proceed with the same and at the same time said 'your observance of this request to proceed with the work' will be the subject of an adjustment of the costs later on. Using a backfill of gravel increased the plaintiff's cost of doing the work by the sum of \$1,877.93.

"Specification 66 refers to Drawing E-404 and this drawing points out where the subsurface drains are to be installed, and does not provide for a backfill of gravel as to the tile drain to be installed underneath the center of the concrete slab.

"It is admitted that a difference existed between the specifications and the work called for under the plans and this difference was as to the character of backfill over the drains. Drawing E.404 expressly discloses an entire absence of any requirement to backfill the drainage area under the center of the concrete slab with gravel and the determination of this question involved not a determination of facts but an interpretation of the contract, drawing, and specifications.

"The contracting officer, in order to reach a conclusion, did of necessity predicate the same by construing the specifications and drawing to exact a backfill of gravel for the drain under the concrete slab by implication. It could not have been done otherwise, for it is clear that no express language imposed this duty upon the contractor. * * *

"The plaintiff performed this extra work under protest. As a matter of fact, a proposal for performing it and the added cost involved were furnished to and considered by the defendant, and, notwithstanding the fact that subsequent to its rejection the plaintiff proceeded under the contract to obtain an extra allowance, we now think that under the decision of this court in the *Davis case, supra*, the plaintiff is entitled to a judgment for \$1,877.93 for performing this extra work. The amount the plaintiff seeks is not challenged by the defendant and it will be included in the final award."

With no opinion, this Court reversed as to this \$1877.-93 item.

CONCLUSION

The Court of Claims based the decision in the instant case on *U. S. v. Pfozter*, 77 Fed. Supp. 390, 111 Ct. Cl. 184. That case is almost identical to our case. This Court in December, 1948, denied *certiorari* in the *Pfozter* case, 335 U.S. 885.

No new question of great importance is raised here and no question that wasn't raised in the *Pfozter* case. We respectfully submit that *certiorari* was improvidently issued in this case, and that this Court should set aside its order of October 10, 1949, allowing *certiorari*, and enter an order denying *certiorari*.

Or, in the alternative, and for the reasons above set forth, we respectfully submit that the judgment of the Court of Claims is correct and should be affirmed.

Respectfully submitted,

F. A. BODOVITZ,
Tulsa, Oklahoma,
Attorney for Respondents.

Of Counsel:

V. J. BODOVITZ,
Oklahoma City 2, Oklahoma.

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